

**Vermont Agency of Natural Resources
Department of Environmental Conservation**

Section 401 Water Quality Certification Practice

I. Purpose

Effective October 22, 2014, this Practice supersedes the “Section 401 Water Quality Certification Procedure” dated April 2, 2012.

It is the goal of this Practice to ensure a consistent application review and internal Agency of Natural Resources (Agency) coordination process with respect to Clean Water Act Section 401 water quality certification (WQC) decisions. The public notice and public hearing requirements relating to WQCs are contained in Section 13.11 of the Department’s Vermont Water Pollution Control Permit Regulations dated February 26, 1974 (VWPCPR).

II. Pre-Application Scoping Meeting with Project Proponent

The Department of Environmental Conservation (Department) strongly encourages that each applicant for a WQC attend a pre-application scoping meeting with representatives from the Agency’s Departments. The Watershed Management Division’s 401 Program Coordinator (401 Program Coordinator or Coordinator) will be responsible for working with applicants to schedule pre-application meetings. The Coordinator will also coordinate with division and department management to ensure that appropriate staff are included in such meetings.

III. Application

- (a) Section 13.11(b) of the VWPCPR states that a Section 401 WQC application shall contain sufficient information including “such additional information deemed necessary” to evaluate the application. The following subsections provide guidance on what the Department may require from a 401 WQC applicant.
- (b) **Section 401 WQC Associated with a Federally-Issued General Permit.** In certain cases a federal agency may issue a general permit for which the Agency may grant general certification or waiver for certain categories of discharges or activities.
- (c) **Application for Individual 401 Certifications not in Connection with a FERC License or Exemption.** An applicant for a federal license or permit will file a request for a WQC on a form provided by the Department, which is available at the Department’s central offices in Montpelier or on the 401 Water Quality Certification website: dec.vermont.gov/business-support/water-quality-certification-section-401.
- (d) (1) **Application for Certification in Connection with a FERC License or Exemption.** An applicant for a FERC license or exemption will file a request for a WQC on a form provided by the Department, which is available at the Department’s central offices in Montpelier or on the Flow Protection - Hydroelectric Power website: dec.vermont.gov/rivers/streamflow-protection/hydroelectric. In addition to information on the application form, the project proponent will provide additional supporting information as follows:

- (A) **FERC licensed projects using the Traditional Licensing Process (TLP):** license application and responses to any FERC additional information requests.
 - (B) **FERC licensed projects using the Integrated Licensing Process (ILP):** license application.
 - (C) **FERC exempt projects:** exemption application and the results of any environmental studies completed as part of the FERC process.
- (2) For WQCs requested in connection with a FERC license or exemption, the timing of the application should be coordinated with the applicable FERC process.
- (A) **FERC licensed projects using the TLP.** Applicants that are using the TLP (18 CFR § 4.30 *et seq.*) may file a certification application following issuance of a Notice of Ready for Environmental Analysis (Notice indicates that FERC is ready to prepare the NEPA document) by FERC.
 - (B) **FERC licensed projects using the ILP.** Applicants that are using the ILP (18 CFR § 5.1 *et seq.*) may file a certification application as early as the date the FERC license application is filed.
 - (C) **FERC exempt projects.** Applicants may only file a certification application after results from all studies necessary to support the application are available and a complete project proposal has been developed.
- (e) **Additional Materials Required.** Prior to making a decision on an application for a WQC, the Department may require that the applicant:
- (1) perform various studies or environmental quality tests including chemical analyses of water, sediment, or fill material; biological assessments; and assessments of habitat suitability;
 - (2) pursuant to 3 V.S.A. § 2809, pay the cost of research, scientific, programmatic, or engineering expertise or services that the Department does not have when such expertise or services are required for the processing of the WQC application; and
 - (3) submit additional information necessary to make its anti-degradation findings pursuant to Vermont's Anti-Degradation Policy and any anti-degradation procedure or rule in effect at the time of application.

IV. Determination of Administratively Complete Application

- (a) **In General.** Within two weeks of receipt of an application, the Department will review the application and determine whether it is administratively complete. An “administratively complete application” is an application that has been determined to include all of the initially required documentation necessary to begin a technical review

of the application. These documents include the correct completed application form(s) and supporting information, signatures, and fees.

- (1) If an application is administratively complete, the Department will issue a letter to the applicant indicating the date of receipt of the application and its administrative completeness.
- (2) If an application is not administratively complete, the Department will contact the applicant via phone, email, or letter, and inform the applicant of the materials needed to make the application administratively complete. If the requested information is not provided within the timeframe provided by the Department, the application may be denied without prejudice and the applicant may reapply at any time. The notice of denial will be provided via email or letter.

(b) Coordination with Federal Agency; Decision Time Clock.

- (1) Section 401 of the federal Clean Water Act provides that a state must act on a request for certification within a “reasonable period of time,” which cannot exceed one year after receipt of the request, or the certification requirement shall be waived. Different federal agencies have defined in regulation what constitutes a “reasonable period of time” for state decision-making. However, federal regulation also gives flexibility to federal agencies to either shorten or lengthen the period of time for states’ decision-making.
- (2) To avoid an inadvertent waiver of a WQC, the 401 Program Coordinator will contact the involved federal agency upon receipt of a WQC application to determine the federal agency’s timeframe for noticing and issuing its federal license or permit. The 401 Program Coordinator will document this timeline in writing. If more time is needed to make a decision, the 401 Program Coordinator will request an extension and confirm in writing. If the federal agency will not grant additional time, the Department may suggest to the applicant that it withdraw and resubmit its application, thereby restarting the clock, or the Department may deny the certification without prejudice if there is insufficient information to make a final decision and encourage the applicant to resubmit the application.

V. Determination of Technically Complete Application

- (a) **In General.** For purposes of this Procedure a “technically complete application” means an application that contains a material record sufficient to support the creation of a draft decision for public notice purposes.

(b) Internal Agency Coordination in Determination on Technical Completeness.

- (1) The Watershed Management Division (WSMD) Director will designate a lead WSMD program manager or staff person for an application who, in coordination with the 401 Coordinator, will ensure coordination in evaluating the technical completeness of the application and take the lead in writing the draft WQC decision.

- (2) The 401 Program Coordinator, in coordination with the lead WSMD manager/staff, will ensure coordination with other affected Agency divisions and departments as follows. Affected Agency divisions and departments may include the Department of Environmental Conservation (DEC); DEC's Watershed Management Division (WSMD); the following programs within WSMD: the Lakes and Ponds Management and Protection Program, the Monitoring Assessment and Planning Program, the Rivers Program, the Stormwater Program, the Wastewater Program, and the Wetlands Program; and the Vermont Fish and Wildlife Department.
- (A) Upon determining that an application is administratively complete, the 401 Program Coordinator will promptly provide written notification via email to all WSMD program managers, the WSMD Director and Deputy, and other affected Agency divisions and departments with a copy of the application.
 - (B) The 401 Program Coordinator will schedule a meeting to discuss the project and application and discuss assigned roles for evaluating the application and drafting a tentative decision.
 - (C) The 401 Program Coordinator will develop a single email address list for all Agency managers and staff involved in the review and processing of the application. All involved staff and managers will use this email address throughout the application review and decision-making process to ensure internal coordination.
 - (D) The 401 Program Coordinator, in consultation with the lead WSMD manager/staff, will provide a date by which other affected divisions and departments must respond to the Coordinator as to whether the application is technically complete for their purposes and identify any additional information that is needed.
 - (E) If the 401 Program Coordinator determines that other Agency divisions and departments are not able to meet the specified deadline for response, the Coordinator will notify the WSMD Director/Deputy. The Director/Deputy will work with the Coordinator, the Department Commissioner, and others as necessary to promptly resolve any timing issues. Any disagreement among or between Agency divisions and departments should be identified early and brought to the Secretary if it cannot be promptly resolved.
 - (F) Once an application is deemed technically complete, the 401 Program Coordinator will notify the applicant in writing. If an application is deemed technically incomplete, the 401 Program Coordinator will notify the applicant in writing with sufficient detail to identify the information or materials necessary to complete the application.

- (G) If an application is technically incomplete, at the Department's sole discretion, no further processing of the application will take place until the information requested is received and determined to be technically complete. If the requested information is not provided within the timeframe provided by the Department, the application may be denied without prejudice and the applicant may reapply at any time. The Department will provide the notice of denial in writing.
- (H) The Department may at any time require an applicant to submit any additional information that it considers necessary to make a determination that an application is technically complete. The application may be denied without prejudice if any requested information is not provided within the timeframe provided by the Department.

(c) Special Provisions for Applications for Certification in Connection with a FERC License or Exemption.

- (1) The Department will process certain applications in connection with a FERC license or exemption within 120 days after a determination that an application is technically complete and Agency staff has had an opportunity to conduct a site visit at an appropriate time of year and during appropriate flow conditions. Projects qualifying for an expedited process are:
 - (A) Run-of-river projects at existing dams (no change to extent of impoundment) for which the proposal provides bypass flows consistent with the default hydrologic standards (Vermont Water Quality Standards, Section 3-01(C)), and the proposal does not impact existing or designated uses or water quality criteria;
 - (B) Run-of-river projects at existing dams (no change to extent of impoundment) with short bypasses having the following characteristics:
 - (i) very low habitat value (e.g., very steep with prominent ledges), or
 - (ii) consisting solely of one or more pools with minimal flow needs to provide for movement of fish and to maintain water quality and aquatic habitat, and
 - (iii) the project site does not have aesthetic or recreational values (e.g., for some waterfalls) or provide habitat for threatened or endangered species;
 - (C) Conduit projects which are physically removed from state and federal waters and have no impact on water quality;
 - (D) Projects for which a 5 MW exemption application has been filed and accepted by FERC.

VI. Scope of Review for Application Decisions

Pursuant to Section 13.11(g)(3) of the VWPCPR, a WQC must contain “a statement that there is a reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards. In making such determination, the Department will evaluate whether an activity complies with applicable state laws and Agency permits, rules, procedures, practices, and policies that ensure compliance with the VWQS.

VII. Coordination in Formation of Tentative Determination on WQC Application.

Prior to issuing a draft WQC determination for public comment, the 401 Program Coordinator will ensure appropriate coordination with other affected Agency divisions and departments as follows:

- (1) Prior to issuing a draft tentative determination for public notice, a draft will be provided to other affected Agency divisions and departments with a specified period of time to participate in drafting and providing comments.
- (2) The 401 Program Coordinator and lead WSMD program manager/staff will ensure that comments of other Agency divisions and departments are considered prior to the issuance of a tentative determination for public comment and will coordinate internal meetings and discussions as needed. In the case of any conflicts or disagreements among or between divisions and departments, the WSMD Director/Deputy will work with the lead Division program manager, the Commissioner, and others as necessary to promptly resolve any disagreements. Any disagreement among or between Agency divisions or departments should be identified early and brought to the Secretary if they cannot be promptly resolved at the department level.
- (3) If the 401 Program Coordinator determines that other Agency divisions or departments are not able to meet the specified deadline for comment, the WSMD Director/Deputy and lead WSMD program manager will work with the Commissioner and others to resolve any timing issues. Any disagreement among or between Agency divisions and departments should be identified early and brought to the Secretary if they cannot be promptly resolved at the department level.

VIII. Content of Certification Decision

- (a) Section 13.11(g) of the VWPCPR states the information that the Department must include in a WQC and grants the Department the authority to include such other information as the Department may determine appropriate and any conditions the Department deems necessary. Pursuant to 13.11(g) a WQC must contain:
 - (1) The name and address of the applicant;
 - (2) A statement of the record upon which the decision is based;
 - (3) A statement that the Secretary has examined:

- (A) the application made by the applicant to the Secretary for certification;
 - (B) the application made to the federal licensing or permitting agency (specifically identifying the number or code affixed to such application) and bases his or her decision upon an evaluation of the information contained in such application which is relevant to water quality considerations; and
 - (C) any other information furnished by the applicant sufficient to permit the Secretary to issue a WQC;
- (4) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate the Vermont Water Quality Standards and other appropriate requirements of state law and will be in compliance with Sections 301, 302, 303, 306, and 307 of the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, as amended;
 - (5) A statement of any conditions which the Secretary deems necessary or desirable with respect to discharge or activity;
 - (6) A condition vesting the Secretary with the authority to reopen and alter or amend the certification conditions over the life of the project when such action is necessary to assure compliance with the Vermont Water Quality Standards and other appropriate requirements of state law;
 - (7) A condition stating that authorized representatives from the Agency, at reasonable times and upon presentation of credentials, may enter upon the site where the activity is taking place for purposes of inspecting and determining compliance with certification conditions;
 - (8) The following statement concerning the effective date and expiration of the certification. The Certification will become effective on the date of issuance, and the conditions of the Certification will become conditions of the federal license or permit (33 U.S.C. § 1341(d)). If the federal authority denies a license or permit, the Certification becomes null and void. Otherwise, it runs for the term of the federal license or permit.
 - (9) The following statement concerning enforcement of the certification. This Certification is only valid for those activities that fully comply with the terms and conditions of the federal license of permit and this Certification. The Agency reserves the authority to enforce any violation of the VWQS that results from any activity or discharge and to enforce all other state laws applicable to such activities and discharges.
 - (10) Appeals language.

- (A) For renewable energy projects: If this decision relates to a renewable energy plant for which a certificate of public good is required under 30 V.S.A. § 248, any appeal of this decision must be filed with the Vermont Public Service Board pursuant to 10 V.S.A. § 8506. This section does not apply to a facility that is subject to 10 V.S.A. § 1004 (dams before the Federal Energy Regulatory Commission), 10 V.S.A. § 1006 (certification of hydroelectric projects) or 10 V.S.A. Chapter 43 (dams). Any appeal under this section must be filed with the Clerk of the Public Service Board within 30 days of the date of this decision; the appellant must file with the Clerk an original and six copies of its appeal. The appellant will provide notice of the filing of an appeal in accordance with 10 V.S.A. § 8504(c)(2), and will also serve a copy of the Notice of Appeal on the Vermont Department of Public Service. For further information, see the Rules and General Orders of the Public Service Board, available on line at www.psb.vermont.gov. The address for the Public Service Board is 112 State Street, Montpelier, Vermont, 05620-2701 (Tel. # 802-828-2358).
- (B) For all other projects: Pursuant to 10 V.S.A. Chapter 220, any appeal of this decision must be filed with the clerk of the Environmental Division of the Superior Court within 30 days of the date of the decision. The Notice of Appeal must specify the parties taking the appeal and the statutory provision under which each party claims party status; must designate the act or decision appealed from; must name the Environmental Division; and must be signed by the appellant or the appellant's attorney. In addition, the appeal must give the address or location and description of the property, project, or facility with which the appeal is concerned and the name of the applicant or any permit involved in the appeal. The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Division is: 32 Cherry St.; 2nd Floor, Suite 303; Burlington, VT 05401 (Tel. # 802-951-1740).

IX. Public Notice and Comment; Public Hearing; Issuance of Decision

The Department will provide public notice of and opportunity for written comments regarding the proposed activity and the tentative determination to issue or deny certification. The public notice will be issued in accordance with Section 13.11(c) of the VWPCPR. The Department will also provide an opportunity for a public meeting in accordance with Sections 13.11(d), (e), and (f) of the VWPCPR. After consideration of public comments, the Agency will make a final decision on the application.