

ADEC Process for Issuing a 401 Waiver of USACE 404 Permits

March 1, 2014

In accordance with Section 401 of the Clean Water Act (CWA) any applicant for a federal license or permit to conduct an activity that might result in a discharge into waters of the U.S. must also apply for and obtain certification from the Alaska Department of Environmental Conservation (ADEC) that the discharge will comply with the CWA, the Alaska Water Quality Standards (WQS, 18 AAC 70), and other applicable State laws. By agreement between the U.S. Army Corps of Engineers (USACE) and ADEC, an application for a USACE permit to discharge dredged and/or fill material into waters of the U.S. under Section 404 of the CWA may also serve as an application for ADEC 401 water quality certification. After reviewing the USACE public notice, ADEC may certify there is a reasonable assurance the activity, and any discharge that might result, will comply with the CWA, the Alaska WQS, and other applicable State laws. ADEC charges a fee for certification under 33 U.S.C. 1341 of a “dredge-or-fill” permit issued under 33 U.S.C 1344 (CWA, sec. 404) the State of Alaska charges. This fee is based on the type of proposed project and can be found at the link below (see Related Links section). After review of the project public notice, ADEC may also deny or waive certification of any activity.

The USACE issues three types of permits under Section 404: individual permits, nationwide permits, and regional general permits. See the USACE link below for a detailed description of each of these types of permits. Words in **bold** are described in the glossary.

Individual Permits

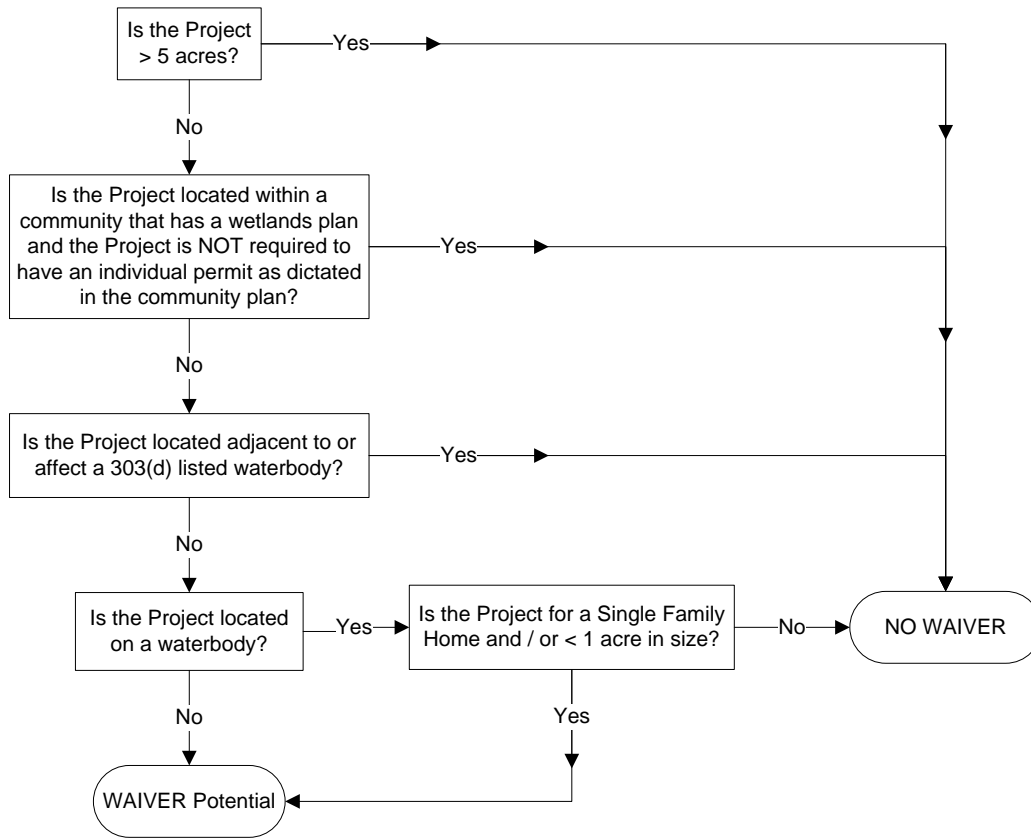
Individual permits are issued by the USACE following a full public interest review of an individual application for a USACE permit. A public notice (usually of 30-day duration) is distributed to all known interested persons and posted on the USACE Alaska District webpage. A final decision on the application is made after evaluating all comments and information received.

ADEC developed these waiver criteria to address a lack of staff resources to process water quality certifications for individual permits issued by the USACE. These waiver criteria do not apply to nationwide permits or regional general permits. The criteria are based on the potential risk a particular type of activity may affect water quality. Experience has shown that the size of the wetlands fill, the type of activity being permitted, the proximity to a waterbody, and the **wetlands functions and values** are all key components for determining risk.

The following is a description of the process ADEC uses to determine if the Department will issue a waiver of water quality certification.

1. On receipt of the USACE public notice for a project, ADEC will conduct a project review. During the project review, ADEC will make an initial determination of whether the project poses a significant risk to water quality. Then ADEC compares the description of the proposed work in the Public Notice with the following criteria:
 - a. The proposed project is less than five (5) acres in total project area.
 - b. The proposed project is in a community that has a **wetlands plan** and the proposed project is not required to have an individual permit as dictated in the community plan.
 - c. The proposed project is not adjacent to or will not affect a **303[d]-listed waterbody**.
 - d. The proposed project is not located directly on a waterbody (such as a stream, lake, estuary, or marine waters).
 - e. The proposed project is on a waterbody, but the project is for a single family residence and/or will disturb less than one (1) acre of wetlands or tidelands.

2. ADEC will make a preliminary decision to waive the project if the project poses no significant risk to water quality and the project meets all of the criteria in #1. The following decision tree shows how the criteria would be applied.



3. ADEC will make a final decision to waive the project after completion of the public comment period by the USACE.
 - a. If there are agency or public comments raising water quality concerns about the project and after review ADEC finds them significant, then ADEC will not waive the water quality certification, even if the project meets the criteria described above. Upon further review ADEC will determine whether to issue or deny water quality certification.
 - b. If there are no agency or public comments about water quality concerns, and ADEC makes a final determination that the project poses no significant risk to water quality, then ADEC will waive water quality certification.
4. ADEC will notify the USACE that the Department is waiving water quality certification after the expiration date of the USACE Public Notice.

Nationwide Permits

Nationwide Permits (NWP) are a form of General Permit issued by USACE Headquarters nationally. NWP authorize specific activities in areas under USACE Regulatory jurisdiction (for example, navigable waterways, wetlands, etc.). These activities are minor in scope and must result in no more than minimal adverse impacts both individually and cumulatively. Individuals wishing to perform work under these NWP must ensure that their project meets all applicable terms and conditions, including the regional conditions specific to Alaska. If the conditions cannot be met, a regional general permit or individual permit will be required.

ADEC will review and issue water quality certification on the nationwide permits (as proposed by the USACE Headquarters) when the USACE reissues them. ADEC will review and comment on individual actions carried out under the nationwide permits as time allows.

Regional General Permits

ADEC will review and issue water quality certification on Regional General Permits.

Glossary of Terms

Community Wetlands Plan - As communities become developed and land becomes scarcer, more pressure has been placed on wetland areas for future community expansion. In anticipating future land use and regulatory conflicts, some communities developed and adopted a Wetlands Management Plan. This land use plan identifies all of community's freshwater wetlands and includes management strategies and permitting requirements for each site.

Waterbody - Shall mean any lake, river, pond, stream or any other distinct mass of water existing in the State of Alaska.

Wetlands - Wetlands have been categorized both as biomes and ecosystems. They are generally distinguished from other water bodies or landforms based on their water level and on the types of plants that thrive within them. Specifically, wetlands are characterized as having a water table that stands at or near the land surface for a long enough season each year to support aquatic plants. According to the USACE, identification of a wetland is based on a three-factor approach involving indicators of hydrophytic vegetation, hydric soil, and wetland hydrology.

Wetlands Functions and Values (bold text) - Wetlands provide many benefits to society -- such as **fish and wildlife habitats, natural water quality improvement, flood storage, shoreline erosion protection, opportunities for recreation and aesthetic appreciation, and natural products for our use at little or no cost.** Protecting wetlands can, in turn, **protect our health and safety by reducing flood damage and preserving water quality.** (EPA)

303[d]- listed waterbody - The term, "303[d] list," is short for the list of impaired waters (stream segments, lakes) that the Clean Water Act requires all states to submit for EPA approval every two years (even-numbered years). The states identify all waters where required pollution controls are not sufficient to attain or maintain applicable water quality standards and rank the waters taking into account the uses of the water and severity of the pollution problem. The federal regulations at 40 CFR 130.7 directs the states to:

1. Identify the waters that require TMDLs (total maximum daily loads);
2. Rank, or prioritize, those waters taking into consideration the water uses and severity of the pollution problem;
3. Identify the pollutant(s) causing or expected to cause violations of the applicable water quality standards; and
4. Identify the waters targeted for TMDL development in the next two years.

401 Certificate of Reasonable Assurance - Clean Water Act Section 401 certification is required for any permit or license issued by a federal agency for any activity that may result in a discharge into waters of the state to ensure that the proposed project will not violate state water quality standards. This water quality certification is part of the Clean Water Act, which allows each state to have input into projects that may affect its waters (rivers, streams, lakes, and wetlands).

404 USACE Permit - Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g. certain farming and forestry activities).

Related Links

- Division of Water, Waste Water Discharge Authorization, Individual Permit Fees (18 AAC 72.957) http://dec.alaska.gov/water/wwdp/online_permitting/individual_permit_fees.htm
- United States Army Corps of Engineers, <http://www.poa.usace.army.mil/Missions/Regulatory.aspx>
- Anchorage wetlands- <http://www.muni.org/Departments/OCPD/Planning/Projects/Pages/AnchorageWetlandsManagementPlan.aspx>
- Juneau wetlands - http://www.juneauwatersheds.org/watershed_library.html
- Kenai Borough wetlands - <http://www.kenaiwetlands.net/>
- Homer wetlands - <http://www.cityofhomer-ak.gov/planning>
- Mat-Su wetlands <http://www.arcgis.com/home/item.html?id=42da68e6fc6c462e89c0f4bf865df1a1>
- ADEC list of 303[d] waterbodies (integrated report) - <http://dec.alaska.gov/water/wqsar/waterbody/integratedreport.htm>
- EPA wetlands page - <http://www.epa.gov/owow/wetlands/>