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**Title 10 – DEPARTMENT OF NATURAL RESOURCES
Division 20—Clean Water Commission
Chapter 6—Permits**

10 CSR 20-6.060 Water Quality Certification

WORKING DOCUMENT

**The Department presents these draft materials for
stakeholder review and discussion only.
Subject to the Red Tape Reduction review.**

The Missouri Department of Natural Resources has identified 10 CSR 20-6.060, Water Quality Certification, as a potential rulemaking amendment. This workgroup has been convened for the purpose of informal and voluntary public participation and discussions regarding the development of this rule prior to initiating formal rulemaking.

Under Governor Greitens' leadership, all state agencies are working to reduce regulations and other government processes that unnecessarily burden individuals and businesses while doing little to protect or improve public health, safety, and our natural resources. The Missouri Department of Natural Resources is committed to limiting regulation to what is necessary to protect Missouri's environment, implementing statutory mandates, and maintaining state control of programs. Any further proposed changes to rules discussed on this page are being developed with these goals in mind. We welcome your comments to help ensure that our regulations provide required protections but do not add unnecessary costs.

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*PURPOSE: Section 401 of Public Law 92-500 and subsequent revisions [requires] states that any applicant for a federal license or permit to conduct any activity which may result in any discharge into the jurisdictional waters of the United States [shall] provide the federal licensing or permitting agency a water quality certification from the state. This certification will contain such conditions that ensure the proposed activity will comply with the state water quality standards and other applicable standards [as required by] **per federal and state law**. This rule establishes the procedure and time limitations the Department of Natural Resources will follow in issuing certifications.*

(1) Definitions. Definitions as set forth in the Missouri Clean Water Law and 10 CSR 20-2.010 [shall] apply to those terms when used in this rule, unless the context clearly [requires] **states** otherwise.

(2) A Clean Water Act Section 401 Water Quality Certification is a direct authorization for the state to review any federal action to ensure that the permitted or licensed action does not negatively impact the state’s water quality standards. Certain federal actions are not valid without a certification or waiver. The Department of Natural Resources, Water Protection Program (department) may issue a certification with or without conditions or deny issuance. Federal actions include but are not limited to:

- (A) The U.S. Army Corps of Engineers has authority over discharge into jurisdictional waters of the United States related to dredge and fill material per Section 404 of the Federal Clean Water Act and Section 10 of the 1899 Rivers and Harbors Act;**
 - 1. Specific action include Nationwide General Permits (NWPs), Regional General Permits, Individual Permits, and Letters of Permission.**
- (B) The U.S. Coast Guard regulates actions that occur in, on, under or over navigable waters of the United States per Section 9 of the 1899 Rivers and Harbors Act.**
- (C) The Federal Energy Regulatory Commission regulates hydropower facilities and issues long-term licenses for facility operation.**
- (D) The Nuclear Regulatory Commission licenses nuclear power plants who’s facilities may impact waters, and**
- (E) The U.S. Environmental Protection Agency authorizes discharges through federally issued Section 402 National Pollution Discharge Elimination System permits, such as the vessel permit.**

(3) General Permits.

- (A) Federal general permits are issued on a routine basis. Those with a national scope are approved through a federal rulemaking process. Others for specific watersheds or political boundaries are public noticed by the federal agency.**

(B) The department may prepare a certification pre-approving certain activities that will not violate water quality standards if certain general and/or specific conditions are met.

- 1. This document shall be proposed through a public participation process, which includes;

 - A. A publicly announced intent to certify the activities and review of the department’s conditions and**
 - B. A public notice of draft conditions.****
- 2. A public information meeting shall be held if sufficient public interest is expressed.**
- 3. Should the deadline for submittal of state conditions to the federal agency be exceeded, the department may utilize the currently approved conditions until the point in time when new conditions have completed the public participation process and been accepted by the federal agency.**

(C) Certification(s) of general permit(s) shall be reviewed in accordance with sections (5) – (10).

(D) Once approved, the certification conditions are sent to the federal agency for acceptance.

- 1. If the general permit conditions are not accepted, then individual certifications must be issued, denied or waived for each federal authorization of such general permit.**
- 2. If the conditions are accepted, then pre-approved conditions become part of each applicable federal authorization. The applicant must ensure the proposed project would comply with the pre-approved conditions. If a condition cannot be met, then an individual certification review would be required by the state.**

(2/4) Application for Certification.

(A) For projects authorized by a general permit which the federal agency has accepted department’s pre-approved condition(s), the applicant need not send an application to the department. An individual certification is required should it be determined an applicant cannot meet one of the pre-approved state conditions or an individual federal permit is necessary. Below is a chart outlining when the department is to be contacted for each type of federal action.

		Federal Contact Required	Individual Certification Required
General Permit (Nationwide or Regional)	Non-reporting	No	No
	Federal notification required and Pre-certified conditions can be met	Yes	No
	§401 condition not met	Yes	Yes
	Not pre-certified	Yes	Yes
Individual Permit or License	Individual certification	Yes	Yes

- (B) Applicants are encouraged to request an optional interagency pre-application meeting with appropriate state and federal agencies in order to coordinate concerns and mitigation, allowing for a more efficient and timely application review. This meeting could provide an opportunity to discuss one compensatory mitigation plan for multiple resources and/or programs as allowed by current state or federal laws, statutes, and regulations.**
- (C) Requests for water quality certifications *[should]* **shall** be sent by the applicant directly to the Department of Natural Resources *[(DNR)], Water [Pollution Control] Protection* Program, P.O. Box 176, Jefferson City, MO 65102*]. The request to the DNR should],* **and** include *[a letter]* **correspondence** requesting the state's water quality certification for the proposed project and *[one (1) copy of the federal application (ENG Form 4345, FEB 94, or the latest revision) with drawings. (The federal agency requires one (1) copy of the federal application (ENG Form 4345, AUG 89) with appropriate drawings and one (1) copy of the letter to the DNR requesting certification.) If the applicant believes a project will be authorized by a general or nationwide 404 permit for which the Corps of Engineers (COE) has accepted DNR's certification, the applicant need not send an application to DNR.]***the information described in subparagraphs (4)(C)1. – 15. of this rule. If the federal application contains any of the information described in subparagraphs (4)(C)1. – 15., that information can be provided to the department by including a copy of the federal application form with the request for certification.**
- 1. Applicant's full identity whether individual or corporate,**
 - 2. Applicant's full mailing address or addresses,**
 - 3. Telephone number at which the applicant may be reached during normal business hours,**
 - 4. If the applicant is utilizing the services of a consultant to apply for certification, Subparagraphs (4)(C)1. – 3. will be needed for the consultant,**
 - 5. Overall project description and range of project,**
 - 6. Purpose and need of the project (e.g., flood control, drainage improvement, erosion control, road construction, etc.),**
 - 7. Project dimensions (e.g., length, width, height) expressed in standard, commonly-used, units of measurement,**
 - 8. Site maps and engineering drawings; sketches may suffice for smaller or less complex projects,**
 - 9. Legal description of the project location (appropriate breakdown into Section(s), Township, Range and County sufficient to locate and define on topographic maps) and Global Positioning System readings,**
 - 10. Name or identity of the water body(s) that the project would be expected to impact and an evaluation by an appropriate federal agency that the water body is jurisdictional,**
 - 11. The acreage or linear feet of water impacted,**
 - 12. A complete description of all work initiated or completed prior to the application submission,**
 - 13. Antidegradation review,**

- A. **To comply with antidegradation requirements, the department will review any applicable analysis of alternatives and/or compliance with Federal Clean Water Act Section 404(b)(1) guidelines to ensure the proposed discharges are unavoidable, that the least damaging practicable alternative is authorized, and if required by the department, compensatory mitigation is provided for adverse impacts to waters of the state.**
 - i. **For waters other than streams, there shall be no net loss of area, value(s) or function(s).**
 - ii. **For streams, there shall be no net loss of length, riparian buffer area, value(s) or function(s) when practicable.**
 - B. **An analysis of alternatives includes at least three alternatives: the preferred alternative with explanation as to why it is the most feasible, other alternative(s) and a “no action” alternative.**
 - C. **Antidegradation requires all appropriate and reasonable Best Management Practices related to erosion and sediment control, project stabilization and prevention of water quality degradation (e.g., preserving vegetation, stream bank stability and basic drainage) are applied and maintained.**
14. **If applicable, a detailed mitigation plan for adverse impacts to the waters of the state shall be provided and the following should be considered:**
- A. **Mitigation may be prescribed using statewide methods that have been public noticed and agency approved to ensure a consistent resource valuation,**
 - B. **Mitigation must be within the State of Missouri,**
 - C. **Mitigation area shall be protected by a perpetual real estate instrument.**
15. **Signature of the legal applicant as authorized in 10 CSR 20-6.010 (Construction and Operating Permits).**
- (D) **An application is determined complete when the applicant provides the minimum information as stated above in subsection (4)(C). A deficiency notice shall be sent within ten (10) business days of receipt of an incomplete application, state the processing of the application will not proceed until the deficiency(s) is corrected, and clearly state the nature and extent of the deficiency(s).**

([3]5) In order to minimize delay [in construction] for individually permitted projects, the federal agency issues a [DNR] joint department/federal public notice on the [permit] federal application. This notice provides the public an opportunity to provide their written comments regarding the proposed [permit] activity. A reasonable comment period, normally thirty (30) days, but not fewer than fifteen (15) days, is provided. [The public notice will express DNR’s intent to certify the proposed project after completion of the public notice period and resolution of any adverse water quality comments received. In the event the DNR receives a request for certification that should not be issued, the DNR will advise the federal agency within ten (10) working days that the joint public notice should not be issued.] Individual joint public notices are not used for projects authorized by general or nationwide permits. [When the Corps has not requested certification for a project that would be authorized by an individual permit, and the certification deadline approaches, a contingent certification action will be issued that approves the project as it appeared in the public notice. This certification is the final certification action on the project as long as nothing in the project changes from what was included in the public notice.] Issuance of a public notice does not signify that a complete application for

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certification has been received by the department, and requests for certification are to be separate from the public notice.

(~~4~~6) After the completion of the joint public notice period, comments received [*by the federal agency*] will be forwarded **to the department** for review and consideration [*by the DNR*]. Consideration shall be given to both direct and indirect water quality effects before issuing or denying water quality certification. Direct effect comments pertain to a water quality problem that would result from the actual work on the proposed project such as increased turbidity, improper disposal of dredge and fill material, and siltation. Indirect effects include long or short range effects that are likely to occur as a result of the proposed construction but are not anticipated to cause water quality problems or pollution at the time of initial construction activity **such as changes to temperature, movement of polluted sediment, and soil erosion.**

(A) If no objections to the proposed project are received during the public notice period and the [*DNR*] **department** determines that no adverse water quality problems are reasonably anticipated, the [*DNR*] **department** will issue a certification with provisions that if adverse water quality problems develop during construction the certification may be suspended pending resolution of the problem(s).

(B) If objections to the proposed project are raised during the public notice period, the federal agency and the [*DNR*] **department** will attempt to resolve the objections. If sufficient public interest is expressed, a public hearing will be held.

1. If the comments are resolved during negotiations or during public hearings [*conducted by the federal agency*], the [*DNR*] **department** will proceed to issue its certification.

2. If the comments are not resolved during negotiations sessions or during public hearings [*conducted by the federal agency*], the [*DNR*] **department** shall review the comments and proceed as follows:

A. If the comments are determined to be valid comments, the [*DNR*] **department** shall either deny certification or issue a certification that is conditioned upon the applicant meeting certain requirements or performing certain actions to prevent or minimize water quality problems; or

B. If the comments are determined to be invalid or not having substantial effects upon water quality, the [*DNR*] **department** shall issue its certification.

(C) **Should the department determine no conditions could be written to be protective of water quality through, but not limited, to monitoring, best management practices or compensatory mitigation, the certification shall be denied.**

(~~5~~7) [*A*] **Per § 644.051, RSMo**, applications for water quality certifications have a sixty (60)-day period in which they must be issued or denied. This period starts when a [*n*] **request for pre-certification of a federal general permit is received by the department or a complete application is received by the department for individually certified projects.** [*Applications for water quality certification for activities requiring individually certified nationwide permits have a thirty (30)-day but no more than sixty (60)-day period in which they must be issued or denied. Either of these periods*] **The 60-day period** may be extended by mutual agreement of the applicant and the department. **Arbitrary refusal to extend the 60-day period pursuant to a reasonable request from the department may result in the denial of water quality certification without prejudice.** Submission of an incomplete application may **also** result in the denial of water quality certification without prejudice **or a determination that the request for**

certification has been withdrawn after proper notification to the applicant of such action prior to the expiration of the 60-day period. The applicant may resubmit an application that has been denied without prejudice or withdrawn once requirements for a complete application have been met, starting a new 60-day period. *[A complete application consists of the sufficient application submitted to the COE, topographical maps, location maps, engineering plans, project diagrams, and where applicable, mitigation plans.]* If a water quality certification action has not been taken within sixty (60) days of the date that the **complete** application has been received by the department, and the department and applicant have not agreed to extend the certification period, water quality certification will be deemed to have been waived for the activity contained in the application.

(A) The department shall notify the federal agency and applicant in writing that a request for certification was received on a specific date and the timeframe for the department to act on that request.

(B) If an extended certification period has been agreed upon, the department’s review shall not extend beyond one year from receipt of a complete application per Section 401 of Public Law 92-500 and subsequent revisions. After such date, the certification shall be deemed waived.

([6] 8) **Certification Effective Date.** Water quality certifications *[that are issued]* for **projects covered under pre-certified federal** general permits *[and are accepted by the COE]* become effective upon issuance. *[W]An individual* water quality certification*[s that are issued for individual certifications and for certifications for general permits that have not been accepted by the COE]* shall become effective upon *[signature and returned with]* **issuance and receipt of applicable fee[s]. The applicant shall not begin a certified project without the issuance of the federal permit or license. An issued certification becomes part of the federal permit or license and; therefore, expires with the federal permit or license unless explicitly stated in the certification. Should a federal permit or license require modification(s), the certification may or may not be modified or reissued depending on the action. When a federal permit or license expiration date is extended with no changes to the original project, the certification shall be reviewed for compliance with current water quality standards and may remain valid for that project.**

(9) Fees.

A. The certification fee shall be set pursuant to 10 CSR 20-6.011.

B. Fees are collected after the certification is issued and required for the following:

- 1. Originally issued individual certification,**
- 2. Transfer of ownership for an individual certification,**
- 3. Change in project plans as proposed by the applicant which results in the individual certification being rewritten, and**
- 4. Any modification or revision to the individual certification as requested by the applicant.**

C. No fee shall be required for correction of a department-made error(s), conditioning a pre-certified federal general permit, projects authorized by pre-certified general permits or extending the individual certification expiration date when no other changes are made.

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- D. Once issued, an individual certification shall be delivered with an invoice for fee to the applicant.**
- E. Once the department receives the fee, the applicable federal agency will be notified in writing that the certification is now in effect and final.**

([7] 10) The issuance, conditional issuance or denial of certification *[under subparagraph (4)(B)2.A. or B. of this rule]* may be appealed to the *[Missouri Clean Water Commission through procedures outlined in the Revised Statutes of Missouri, Chapter 644]* **Administrative Hearing Commission per Section 621.250, RSMo**. The appeal shall be a contested case and notice of the appeal shall be filed with the *[commission]* **Administrative Hearing Commission** within thirty (30) days of service of notice to the applicant of denial or grant of the requested certification as specified in 10 CSR 20-6.020(5).

([8] 11) Effective Date. This rule becomes effective immediately upon adoption and compliance with the requirements of subsection 644.036.3 of the Missouri Clean Water Law.

AUTHORITY: sections 644.026, RSMo 20[00]14 and 644.076, RSMo 2005. Original rule filed Feb. 10, 1978, effective July 13, 1978. Amended: Filed May 11, 1984, effective Oct. 15, 1984. Amended: Filed Nov. 9, 2000, effective July 30, 2001.*

**Original authority: 644.026, RSMo 1972, amended 1973, 1987, 1993, 1995, 2000, 2012, 2014. 644.076, RSMo 1972, amended 1973, 1993, 2000, 2004, 2005.*