

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

10 CSR 20-6.060 Water Quality Certification

PURPOSE: Section 401 of Public Law 92-500 and subsequent revisions requires that any applicant for a federal license or permit to conduct any activity which may result in any discharge into the navigable-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 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 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. Federal actions that require a certification are not valid without a certification or waiver. The Department of Natural Resources, (DNR) Water Protection Program may issue a certification with or without special conditions or deny issuance. Federal Actions, which may require certification, 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 DNR may prepare a certification pre-approving certain activities that will not violate water quality standards if certain conditions are met. This document shall be proposed through a public participation process, which may include a publically announced intent to review the DNR's general and specific conditions, a public information meeting, and public notice of draft conditions.

Comment [SMB1]: New Section. I wanted to clarify that certifications can be and are used for more than USACE permits. Other federal agency permits require certifications, though those tend to be less common (and sometimes more intense).

Comment [SMB2]: This is the old section (6), which has been significantly revised and moved up.

Comment [SMB3]: 10/20/2014
Condensed this subsection per verbal comment.

1. Should the deadline for submittal of state conditions to the federal agency be exceeded, the DNR 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.

(D) General conditions may include reference to the following, or specific conditions may be warranted as a means to protect the state's water quality standards depending on the nature of each proposed activity.

1. Projects shall avoid and then minimize adverse impacts to waters before compensatory mitigation may be required.

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.

2. There shall be no net loss of a water's length, area, value(s) or function(s). This loss could be compensated with an approved compensatory mitigation plan.

3. Projects shall not unreasonably interfere with navigation in navigable waters.

4. Conditions may be required to ensure compliance with applicable water quality standards in sensitive waters, such as but not limited to outstanding resource or impaired waters.

5. Projects shall be designed, installed, and implemented in a manner to protect a water's designated uses, such as the protection of aquatic life, based on current engineering and scientific practices.

6. Acquisition of a certification shall not be construed or interpreted to imply the requirements for other regulatory actions are replaced or superseded, including permits under the Missouri Clean Water Law (Chapter 644, RSMo) and Missouri Safe Drinking Water Law (Chapter 640, RSMo).

7. Fuel, oil and other petroleum products, equipment, construction materials and any solid waste shall not be stored below the ordinary high water mark at any time or in the adjacent area beyond normal working hours where flooding may or has a reasonable potential to occur.

8. All precautions shall be taken to avoid the release of wastes or fuel to streams and other adjacent waters as a result of this operation.

9. Petroleum products spilled into any water or on the banks where the material may enter waters of the state shall be immediately cleaned up and disposed of properly. Any such spills of petroleum shall be reported as soon as possible, but no later than 24 hours after discovery to DNR's Environmental Emergency Response Program.

10. Only clean, nonpolluting fill shall be used.

11. A stream's pattern, profile and dimension shall be maintained as much as practicable.

12. Best Management Practices may be required to limit the amount of contaminant discharge to waters of the state.

13. Project activities may be limited in area or distance upstream and downstream as well as for certain periods of time in a water to prevent adverse impact.

Comment [SMB4]: 644.026.1.(26) and Missouri executive order 96-03

Comment [SMB5]: 10/20/2014
MoDOT: Projects impacting water resources in Missouri must be mitigated in Missouri. This is a jurisdictional issue...Missouri DNR cannot enforce mitigation plans in another state.

Comment [SMB6]: 10/20/2014 change
MoDOT: Changed 'protection' to 'instrument.' Long-term protection may be provided through a restrictive covenant, deed restrictions, conservation easements, or for some federal, tribal, state or local resource agencies through facility management plans or integrated natural resources management plans as long as those plans are compatible with real estate protections specified on non-government property.

Comment [SMB7]: Missouri executive order 96-03.

10/20/2014:
Statement likely to be revised in future, but no language offered at this time.

MoDOT: This EO references only wetlands and this was mentioned at the August 2014 meeting. This item as written would include both stream and wetland no net loss. Therefore stream no net loss is above what is required of EO.

AMA: No net loss for streams would be implemented through the current practices we have in place for wetlands. Wetlands are impacted in 'de minus' each day and not required to have mitigation per NWP's. A roadway bridge does not remove the stream from the system...the amount of linear feet ...

Comment [SMB8]: 10/20/2014
AMA: This is duplicative of the USACE, but the state has historically also been involved with navigation. These statements are for all potential certifications, of which the USACE is only a part of. Other federal agencies may also issue permits that ...

Comment [SMB9]: 10/20/2014
This statement is specific to sensitive waters, noting that a specific project may have specific conditions in order to protect a sensitive water's water quality. Currently, a condition with NWP's state that if a project is proposed within an outstanding resource ...

Comment [SMB10]: 10/20/2014
AMA: The reference to floodway is not related to FEMA definitions. This statement is intended to protect waters for pollutants at any time day or night within a stream channel (such as on a gravel bar) and also after working hours when no one would be ...

Comment [SMB11]: 10/20/2014
MoDOT: Some of the statements in this subsection are intended to be vague as they would be fine-tuned based on a specific proposal. If there are suggestions for adding clarity, those would be considered.

TT: changes made

Comment [SMB12]: 10/20/2014
AMA: Many times a certification is issued when no NPDES permit is required (sand and gravel mining, stream bank stabilization, etc.). This is addressing those instances in particular.

Comment [SMB13]: 10/20/2014
MoDOT: This statement is not intended to address spawning restrictions. There some pre-certified NWP's that have for instance a 200 LF upstream and 200LF downstream limit attached to them...so if a project is going to impact the channel 300 LF downstream, then an individual 401 would be ...

14. Representatives from DNR shall be allowed on the project property to inspect the authorized activity at any time deemed necessary by the department to ensure compliance with certification conditions.

Comment [SMB14]: 10/20/2014 AMA: This is statement would be within the certification document so the conditions referenced would be the conditions in the certification. Some language has been added to clarify.

(E) Certification(s) of general permit(s) shall be reviewed in accordance with sections (5) – (11).

(F) 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 approved, 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 from the state.

Comment [SMB15]: All USACE Districts have accepted our pre-certification conditions. The 2012 NWP cycle we have pre-certified 30 of the 41 NWPs under the 404 authority. Of those thirty pre-certified NWPs, fourteen NWPs have general conditions and sixteen NWPs have general and specific conditions. The remaining 11 NWPs, which are less common, have significant impacts in the view of the state, and/or affect sensitive resources, must have an individual WQC. The DNR does not typically issue a WQC for Section 10 activities, which includes the remaining 9 NWPs for a total of 50 NWPs issued by the USACE

(42) Application for Certification.

(A) Projects authorized by a general permit for which the federal agency has accepted DNR's pre-approved condition(s), the applicant need not send an application to DNR. 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 DNR would be required to be contacted for each type of federal action.

Comment [SMB16]: 10/20/2014 added 'state' and 'federal'

		<u>Federal Contact Required</u>	<u>Individual Certification Required</u>
<u>General Permit (Nationwide or Regional)</u>	<u>Non-reporting</u>	<u>No</u>	<u>No</u>
	<u>Federal notification required and Pre-certified conditions can be met</u>	<u>Yes</u>	<u>No</u>
	<u>401 Condition not met</u>	<u>Yes</u>	<u>Yes</u>
	<u>Not pre-certified</u>	<u>Yes</u>	<u>Yes</u>
<u>Individual Permit</u>	<u>Individual certification</u>	<u>Yes</u>	<u>Yes</u>

(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. Should compensatory mitigation be required for other programs, this meeting could provide an opportunity to discuss one mitigation plan for multiple resources as allowed by current state or federal laws, statutes, and regulations.

Comment [SMB17]: New subsection. Partially based on verbal comment.

(C) Requests for water quality certifications ~~should~~ shall be sent by the applicant directly to the Department of Natural Resources (DNR), Water ~~Protection~~ ~~Pollution Control~~ Program, P.O. Box 176, Jefferson City, MO 65102. The request to the DNR ~~should~~ shall include a

~~correspondence letter~~ requesting the state's water quality certification for the proposed project and one (1) copy of the federal application or information consisting of at least (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.

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 (If the Applicant is utilizing the services of a consultant to apply for certification, Subsection (2)B, (2)C, and (2)D will be needed for the consultant.).
4. Overall project description and range of project.
5. Purpose and need of the project (e.g., flood control, drainage improvement, erosion control, road construction, etc.).
6. Project dimensions (e.g., length, width, height) expressed in standard, commonly-used, units of measurement.
7. Site maps and engineering drawings; sketches may suffice for smaller or less complex projects.
8. Legal description of the project location (appropriate breakdown into Section(s), Township, Range and County sufficient to locate and define on topographic maps) and GPS readings.
9. Name or identity of the water body(s) that the project would be expected to drain to and if a water body is not perennial, the applicant will need to include an evaluation by an appropriate federal agency that the water body is jurisdictional.
10. The acreage or linear feet of water impacted.
11. A complete description of all work initiated or completed prior to the application submission.
12. A detailed mitigation plan must also be submitted where losses to the state's aquatic resources will be incurred.
13. Antidegradation procedures.
 - A. To comply with antidegradation requirements, the DNR will review any applicable analysis of alternatives and/or compliance with Section 404(b)(1) guidelines to ensure the proposed discharges are unavoidable (i.e., necessary), that the least damaging practicable alternative is authorized, and mitigation is required for all impacts associated with adverse impact.
 - B. An analysis of alternatives shall include at least three alternatives: the preferred alternative, other alternative(s) and a "No action" alternative. Explanation of why the proposed action is the most feasible is required.
 - 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.
 - D. Mitigation may be required for all permanent adverse impacts to waters of the state.
14. Signature of the legal applicant is required. All applications shall be signed by the party(s) authorized in 10 CSR 20-6.010 (Construction and Operating Permits).

Comment [SMB18]: 10/20/2014
Reinstated "(1) copy of the federal application" based on verbal and written comments. Not intending to reference a specific federal form since those vary and are revised at a different schedule than the rule.

AMA: The basic information remains the same as previous requirements. The department issues certifications for more than just USACE 404 permits so this section is intended to be more general than previous rule. We have and will continue to accept duplicative copies of a federal application, whether it is ENG form 4345 as part of a USACE permit application or a different format that results from a different federal agency application.

TT: The department still plans on accepting the USACE application form, but we are trying to make it more general so that it applies to all federal actions that require certifications. The department and the USACE are currently working on a joint processing agreement to make the application process more clear and efficient to an applicant.

Comment [SMB19]: 10/20/2014
Change 'shall' to 'may.'

MoDOT: This subsection addresses individual certifications...not pre-certified NWP's such as NWP14. Per state statute, the department cannot require wetland mitigation on NWP's.

644.037. Where applicable, under Section 404 of the federal Clean Water Act and where the U.S. Army Corps of Engineers has determined that a nationwide permit may be utilized, the department shall certify without conditions such nationwide permit as it applies to impacts on wetlands in this state.

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(D) For an application to be determined complete, applicants must provide the minimum information as stated above in Subsection B. A deficiency notice shall be sent within 14 business days should an application found to be incomplete. The deficiency notice shall clearly state that the processing of the application will not proceed until the deficiency(s) is corrected and shall clearly state the nature and extent of the deficiency(s).

Comment [SMB20]: 10/20/2014 changes made TT: suggested a time period of 14 days for review. The department may need to consider if this is a practical time permit but has been added here to seek comment.

(53) In order to minimize delay ~~in construction~~ for individually permitted projects, the federal agency issues a joint DNR/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-twenty-one (3021)~~ 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 project public notices are not used for projects authorized by general or nationwide permits. Public notices do not constitute a complete application, and requests for certification shall not be part of the public notice. ~~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.~~

Comment [SMB21]: Nebraska public notices both the pre-certification conditions and individual certification conditions. Kansas references their Water Quality Standards in the pre-certification to NWP's and individual certifications therefore do not feel the need to public notice either since the standards are in rule.

10/20/2014
TT: We are still doing a joint public notices for projects that require them. This process isn't changing.

Comment [SMB22]: 10/20/2014
TT: wishes to discuss, meaning not clear.

(64) After the completion of the joint public notice period, comments received ~~by the federal agency~~ will be forwarded to the DNR 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.

(A) If no objections to the proposed project are received during the public notice period and the DNR determines that no adverse water quality problems are reasonably anticipated, the DNR 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 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 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 shall review the comments and proceed as follows:

A. If the comments are determined to be valid comments, the DNR 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 shall issue its certification.

(B) Should the department determine no conditions could be written to be protective of water quality standards, such as water quality criteria, best management practices or compensatory mitigation, the certification shall be denied.

(75) Per Chapter 644.051, RSMo, aApplications for water quality certifications have a sixty (60)-day period in which they must be issued or denied. This period starts when a request for certification for general permit is received by the department or a complete application is received by the department for individually certified project. ~~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, federal agency and the department. Submission of an incomplete application or no agreement on an extended review period may result in the denial of water quality certification without prejudice. An incomplete application may also result in 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, re-starting the 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.

Comment [SMB23]: 10/20/2014
AMA: see subsection (4)(C) for what constitutes a complete application.

(A)The department shall notify the federal agency and applicant in writing either formally or informally that a request for certification was received on a specific date and the timeframe for DNR 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.

Comment [SMB24]: 10/20/2014 changes made
TT: notification can be an email.

(86) Certification Effective Date. Water quality certifications that are issued for general permits and are accepted by the ~~COE~~ federal agency become effective upon issuance. Water quality certifications that are issued for individual certifications and for certifications for general permits that have not been accepted by the ~~federal agency~~ COE shall become effective upon signature and returned with applicable fees. 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 may remain valid for that project.

(9) Fees.

A. The certification fee shall be set pursuant to Chapter 644.052.9 and 644.054, RSMo, and 10 CSR 20-6.011.

- B. Fees are collected after the certification is issued and shall be required for the following:
1. Originally issued individual certification.
 2. Transfer of ownership in 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 DNR-made error(s), conditioning a federal general permit, individual projects authorized by pre-certified general permits or for extending the individual certification expiration date when no other changes are made.
- D. Once the DNR has issued an individual certification, the authorization is delivered with an invoice for fee to the applicant.
- E. Once the DNR receives the fee, the applicable federal agency will be notified in writing that the certification is now in effect and final.

Comment [SMB25]: 10/20/2014 changes made TT: suggested language, could be an email.

(10) Enforcement.

- (A) Should an applicant violate any part(s) of the certification or water quality standards, the department may pursue enforcement.
- (B) Enforcement may result in requirements for penalty payment, site restoration, compensatory mitigation, and/or certification after-the-fact.

Comment [SMB26]: 10/20/2014
Will be discussing the enforcement side of certification with WPP's Enforcement Section in the future. I have nothing additional to offer at this time.

(117) The issuance, conditional issuance or denial of certification under subparagraph (46)(B)2.A. or B. of this rule may be appealed to the Administrative Hearing Commission under Section 620.250, RSMo. Missouri Clean Water Commission through procedures outlined in the Revised Statutes of Missouri, Chapter 644. The appeal shall be a contested case and notice of the appeal shall be filed with the Administrative Hearing Commission ~~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).

(128) 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: section 644.026, RSMo 2000. 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.*