

# Regulation 61-101

## Water Quality Certification

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2600 Bull Street | Columbia, SC 29201

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## A. GENERAL

1. This regulation establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.

2. Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department. Potential applicants are encouraged to contact the Department prior to submitting an application. Federal law provides that no Federal license or permit is to be granted until such certification is obtained. Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to:

(a) individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344.

(b) Federal permits issued pursuant to Sections 9 and 10 of the Federal River and Harbor Act, 33 U.S.C. Sections 401 and 403.

(c) permits or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. Section 1791, et seq.

3. The Department may issue, deny, or revoke general certifications for categories of activities or for activities specified in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations. Such general certifications are subject to the same process as individual certifications.

4. Any certification issued by the Department shall specify where appropriate that any such discharge will comply with applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Clean Water Act. If there is not an applicable effluent limit or standard under such sections, the Department will so certify. The Department shall also certify that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards regulations. No certification will be issued if such assurance is not provided.

5. Any certification issued by the Department shall also set forth any limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards and compliance with other requirements of these regulations or other appropriate requirements of State law.

6. The Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended. If the Federal permitting or licensing agency suspends processing of the application on request by the applicant or the Department or of its own volition, suspension of processing of application for certification will also occur, unless specified otherwise in writing by the Department. Unless otherwise suspended or specified in this regulation, the Department shall issue a proposed decision on all applications within 180 days of acceptance of an application.

7. For Federal permits that require both a water quality certification and a coastal zone consistency certification, the coastal zone consistency certification determination shall be issued as a component of, and concurrently with, the water quality certification, according to the administrative procedures set forth in this regulation, and in accordance with the management policies of the S.C. Coastal Management Program and applicable laws and regulations. In these instances, the water quality certification will serve also as the coastal zone consistency certification.

8. The Department will not issue a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone pursuant to applicable regulations governing issuance of permits for alteration of the critical area of the coastal zone. The Department will process permit applications pursuant to applicable regulations governing issuance of permits for alteration of the critical area of the coastal zone with coordination and input from appropriate staff regarding water quality impacts. The direct permit will serve as the 401 water quality certification for an associated Federal permit.

9. If an activity also requires a permit for construction in State navigable waters pursuant to applicable laws and regulations, the review for the water quality certification will consider issues of that permit and the Department will not issue a separate permit for construction in State navigable waters. The certification will serve as the permit.

## **B. DEFINITIONS**

Other than those terms defined below, any term used in this regulation shall be the same as defined in Section 48-1-10 or Regulation 61-68 of the Code of Laws, 1976.

1. "Board" means the Board of the Department of Health and Environmental Control.
2. "Certification" means certification as required under Section 401 of the Clean Water Act, 33 U.S.C. Section 1341.
3. "Commissioner" means the Commissioner of the Department of Health and Environmental Control.
4. "Department" means the Department of Health and Environmental Control.

## **C. APPLICATIONS**

1. Any applicant for certification needed for a Federal license or permit must present a complete application to the Department in a manner specified by the Department. Federal application forms or forms provided by the Department will be accepted. Upon receipt of an application, the Department may require additional information to make the application complete. The Department will accept a public notice issued by the Federal permitting or licensing agency as application for certification if it contains sufficient information. Generally, the date of receipt of the public notice will be considered the date of application for certification. As a minimum the application must contain the following information:

(a) the name, address, phone numbers, principal place of business of the applicant and, if applicable, the name and address of the agent for the applicant.

(b) a complete description of the proposed permitted activity, including the location, affected waterbody(s), purpose, and intent of the project; maps, drawings, and plans sufficient for review purposes (detailed engineering plans are not required).

(c) a description of all proposed activities reasonably associated with the proposed permitted project either directly or indirectly, including planned or proposed future development that relate to water quality considerations.

(d) a description of the composition, source, and quantity of any material to be dredged or used as fill and a description of the area to be impacted, including the area of fill in acres.

- (e) the method of dredging or filling and specific plans for disposal and control of dredge spoils.
- (f) the names and addresses of adjacent property owners.

2. If the Department does not request additional information within ten (10) days of receipt of the application or joint public notice, the application will be deemed complete for processing; however, additional information may still be requested of the applicant within sixty (60) days of receipt of the application.

3. The Department may require the applicant to provide water quality monitoring data, water quality modeling results, or other environmental assessment related to factors in Article F.3 prior to accepting or processing the application and assessing the impacts of the proposed activity.

4. When the Department requests additional information it will specify a time for submittal of such information. If the information is not timely submitted and is necessary for reaching a certification decision, certification will be denied without prejudice or processing will be suspended upon notification to the applicant by the Department. Any subsequent resubmittal will be considered a new application.

#### **D. PUBLIC NOTICE**

1. Public notice is required of all applications for certification of Federal licenses or permits. When consistent with procedures herein and practical, joint public notice procedures with Federal or State agencies will be used to facilitate processing.

2. The public notice of application shall provide a reasonable period of time, normally thirty (30) days from the date of notice within which interested persons may submit their views and information concerning the certification application to the Department.

3. If the Department determines that an application is of a type that is routinely granted and the impacts are minor, the Department may reduce the notice period to fifteen (15) days. If the Department determines that an application involves a major activity, the notice period may be extended up to sixty (60) days from the date of the initial public notice.

4. Public notice of the application shall be by each of the following methods:

(a) by the Department's mailing a copy of the Notice of Application to:

- 1. the applicant.
- 2. any agency with jurisdiction over or interest in the activity or disposal site.
- 3. owners or residents of property adjoining the area of the proposed activity as identified in the application.
- 4. newspapers of local and statewide interest in the area.
- 5. any adjacent State agency of North Carolina or Georgia with jurisdiction over or interest in common waters affected by the proposed activity.

6. anyone who has specifically requested copies of public notices. The list of such person will be updated periodically and persons deleted who fail to respond to normal Department requests to identify continued interest. Nongovernmental interests out-of- state may be charged an annual fee of \$25.00 for notices.

(b) by publication by the applicant of the Notice of Application in a newspaper of local or general circulation reasonably expected to cover the area affected by the activity. Such publication by the applicant shall contain sufficient information for the reader to understand the location, nature, and extent of the proposed activity and a contact for further information. The applicant shall provide the Department with an affidavit of publication from the newspaper within fifteen (15) days of publication.

(c) the Department will coordinate with other regulatory agencies and develop joint procedures for publication of notices of applications where feasible to minimize duplication.

## **E. PUBLIC HEARING**

1. Any person may request a public informational hearing during the initial comment period discussed in Article D.2. and D.4. above. Requests shall be in writing and shall state the nature of the issues to be raised at the hearing.

2. The Department shall hold a public informational hearing whenever twenty (20) or more individual written requests are received during the public comment period and which raise water quality and classified use issues. A hearing may also be held whenever the Department staff determines that it may be useful in reaching a decision on an application. Such hearing will be conducted by Department staff personnel.

3. All public hearings shall be reported verbatim. A copy of the transcript shall be made available for public inspection.

4. The public comment period on an application will automatically be extended to fifteen (15) days past the date of the hearing. Further extensions may be granted at the discretion of the hearing officer.

5. The Department will coordinate with other regulatory agencies and conduct joint public hearings where feasible.

## **F. SCOPE OF REVIEW FOR APPLICATION DECISIONS**

1. The Department shall prepare a written assessment on each proposed activity requiring a Federal license or permit. This assessment shall address the water quality impacts of the project and will make conclusions concerning compliance with water quality standards, protection of classified uses, and related water quality impacts. Such assessment shall be available to the applicant and to the public upon request.

2. A certification shall be issued if the applicant has demonstrated that the project is consistent with the provisions of these regulations; the State Water Quality Standards, R. 61-68; and the Federal Clean Water Act, 33 U.S.C. 1341, and regulations promulgated there under by the U.S. Environmental Protection Agency.

3. In assessing the water quality impacts of the project, the Department will address and consider the following factors:

(a) whether the activity is water dependent and the intended purpose of the activity;

(b) whether there are feasible alternatives to the activity;

(c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

- (1) impact on existing and classified water uses;
- (2) physical, chemical, and biological impacts, including cumulative impacts;
- (3) the effect on circulation patterns and water movement;

(4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

4. Certification of the activities listed below will be issued when there are no feasible alternatives. When issuing certification for such activities, the Department shall condition the certification upon compliance with all measures necessary to minimize adverse effects, including stormwater management. The Department shall issue proposed certification decisions on such applications within sixty (60) days of acceptance of the application unless otherwise suspended or in accordance with State permitting agency procedures. The Department will also attempt to issue general certifications for such activities.

- (a) public boat ramps to enhance recreational use of waters.
- (b) filling necessary for public highways or bridges.
- (c) filling or disturbances to facilitate construction of electric transmission lines or other public utility crossings, including those of rural electric cooperatives.
- (d) dredging and filling related to maintenance of Federal or State navigational channels and ports.
- (e) activities utilizing Best Management Practices (BMP) which are part of an established on- going farming, ranching, aquaculture, or silviculture operation.
- (f) public water supplies.

5. Certification will be denied if:

- (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired;
- (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses;
- (c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species;
- (d) the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers;

6. Certification will not be issued unless the Department is assured appropriate and practical steps including stormwater management will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.

7. After-the-fact certifications will be reviewed under the same standards as normal applications; however, the Department may require restoration and/or other actions as a condition of certification. The applicant in such cases shall have the burden of proving the original baseline conditions, and certification may be denied in the absence of such proof.

## **G. NOTICE OF PROPOSED DECISIONS AND ADJUDICATORY HEARINGS FOR CERTIFICATIONS FOR FEDERAL LICENSES OR PERMITS**

1. The Department shall issue a notice of proposed decision on application for certification, including any proposed conditions. Such notice shall advise of availability of the staff assessment and related file information. Such notice shall be mailed to:

- (a) the applicant;
- (b) agencies having jurisdiction or interest over the disposal site or activity site;
- (c) owners or residents of property adjoining the area of the proposed activity; and
- (d) those persons providing comment in response to the initial notice of application.

2. Persons with legal standing to contest the certification shall have rights to appeal the decision.

3. A person desiring to appeal a determination must submit a written request for an adjudicatory hearing within fifteen days of notice of the determination. The request must set forth the manner in which the person requesting the hearing would be injured by issuance of the certification. If no appeal of the proposed decision is timely received, the proposed decision of the Department shall become final.

4. Upon timely request for a hearing, the matter shall be heard as a "contested case" under the South Carolina Administrative Procedures Act, and shall be processed according to law. Determinations of whether a person has legal standing to contest a determination shall be made in the course of the contested case proceeding.

5. Appeals of a certification which include coastal zone consistency certification will be heard according to the above procedures unless the appeal is based exclusively on a coastal zone management issue. In that case the appeal will be heard according to the procedures for appeals of coastal zone consistency certifications.

6. Appeals of a certification included in the direct permit for alteration of the critical area of the coastal zone will be heard as part of that permit appeal according to the procedures for appeals of direct permits for alteration of the critical area of the coastal zone.

## **H. ENFORCEMENT OF CERTIFICATION DECISIONS AND CONDITIONS**

1. Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law.



2. Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit. Other mechanisms under State law may also be used to correct or prevent adverse water quality impacts from construction or operation of activities for which certification has been issued.

3. The Department may conduct inspections for determining compliance with certification conditions.