
Idaho Section 401 Certification Guidance

State of Idaho
Department of Environmental Quality



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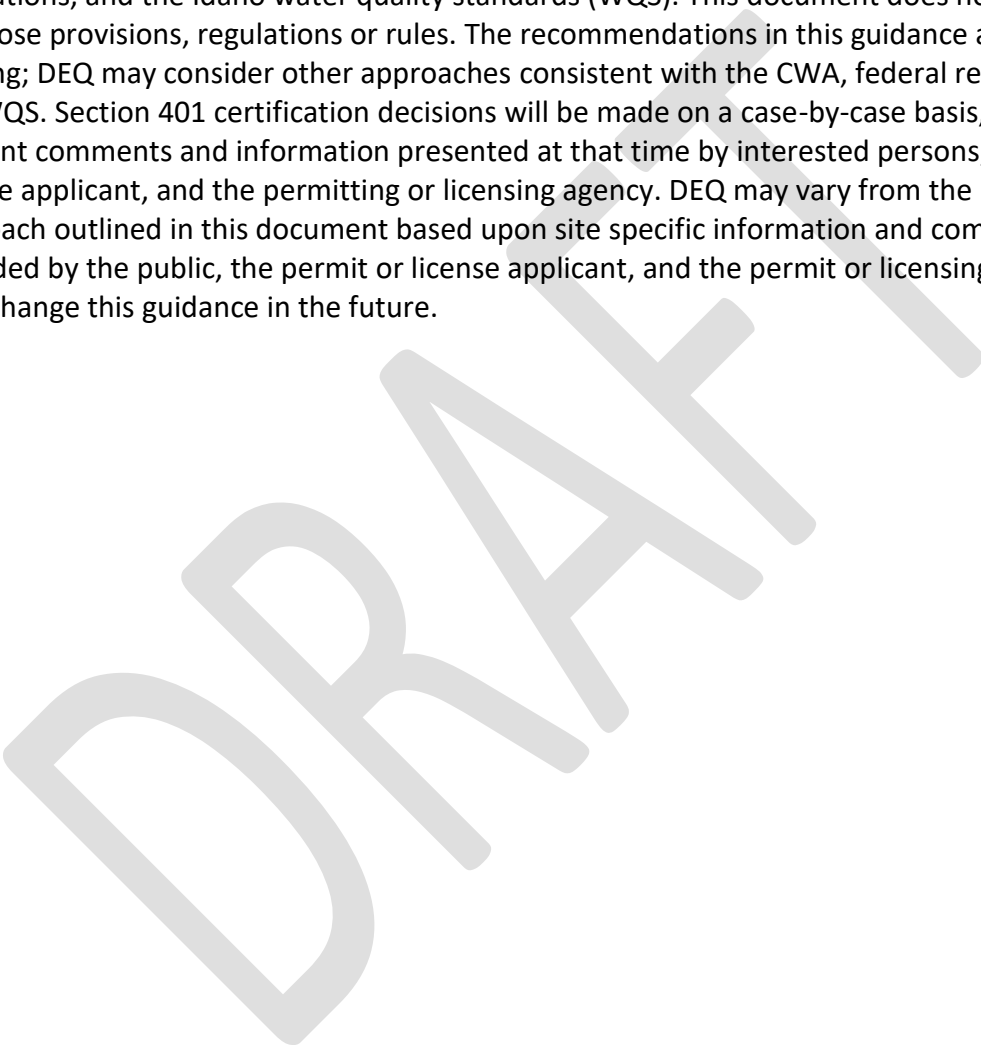
Abbreviations, Acronyms, and Symbols

ACOE	US Army Corps of Engineers
CFR	Code of Federal Regulations
CWA	Clean Water Act
DEQ	Idaho Department of Environmental Quality
EPA	US Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
IDAPA	Idaho Administrative Code
IPDES	Idaho Pollutant Discharge Elimination System
NPDES	National Pollutant Discharge Elimination System
WQS	Water Quality Standards

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Executive Summary

This document is intended to assist the Idaho Department of Environmental Quality (DEQ) in maintaining and implementing a consistent state-wide approach for 401 certifications. This document does not create a right or benefit, substantive or procedural, enforceable at law or equity by any party vs. DEQ, its employees or any other person. This document provides guidance for conducting 401 certifications of federal permits or licenses. Section 401 certifications will be governed by existing requirements of the Clean Water Act (CWA), federal regulations, and the Idaho water quality standards (WQS). This document does not substitute for those provisions, regulations or rules. The recommendations in this guidance are not binding; DEQ may consider other approaches consistent with the CWA, federal regulations, and the WQS. Section 401 certification decisions will be made on a case-by-case basis, taking into account comments and information presented at that time by interested persons, the permit or license applicant, and the permitting or licensing agency. DEQ may vary from the recommended approach outlined in this document based upon site specific information and comments provided by the public, the permit or license applicant, and the permit or licensing agency. DEQ may change this guidance in the future.



1 Introduction

CWA section 401 requires any applicant for a federal license or permit to conduct any activity which may result in a discharge into navigable waters to provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate, that the discharge will comply with applicable provisions of the CWA and state WQS. This guidance document addresses 401 certifications for: permits issued by the U.S. Army Corps of Engineers (ACOE) under section 404 of the CWA, and licenses for hydroelectric facilities issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. There may also be other permits and licenses for which DEQ must provide certification that are not addressed specifically by this guidance document.

Section 401 requires states to establish procedures for public notice in the case of all applications for certification and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.

Section 401 provides that the 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 is waived.

Federal agencies have further defined the “reasonable period of time” within which a state must make its 401 certification decision. For permits issued under section 404 of the CWA, states generally have sixty (60) days to provide certification decisions, unless the ACOE agrees a longer period of time for the certification is warranted. For licenses issued by FERC, states have one year from the date the request for certification is received to provide certification.

DEQ is the agency designated in the State of Idaho to make 401 certification decisions. Currently, the duties of this program are coordinated from the DEQ State Office and administered from six regional offices.

DEQ has set forth, in this guidance document, time frames and procedures it considers appropriate with respect to most 401 certifications. DEQ has worked with the ACOE and EPA in establishing these interagency procedures. Through the implementation of this guidance document, it is DEQ’s goal to ensure a consistent state-wide process that will provide adequate public notice and an opportunity to comment with respect to DEQ’s 401 certification decisions.

2 Guidance Applicable to all Federal Permits or Licenses

2.1 Information to Support the 401 Certification Request

In order to make its 401 certification decision, DEQ must have adequate information. It is the obligation of the permit or license applicant to provide sufficient information that establishes the discharge will comply with applicable provisions of the CWA, state WQS (IDAPA 58.01.02),

and other appropriate water quality requirements of state law. Federal regulations at 40 CFR 121.5 specify the minimum required content for a valid certification request. If the applicant does not provide all of the information required under 40 CFR 121.5 for the federal permit or license involved, the applicant has not submitted a valid certification request. DEQ may request additional information from the applicant to cure an invalid certification request or, if necessary under the circumstances of the permit or license involved, to support action on an otherwise valid certification request.

DEQ will work with applicants and the federal licensing or permitting agency in order to ensure the receipt of information relevant to 401 certification decisions. Federal regulations at 40 CFR 121.4 require the applicant to submit a written pre-filing meeting requests to DEQ at least 30 days prior to submission of application certification request. The request should be sent to Certificationrequests@deq.idaho.gov with “Pre-Filing Meeting Request” in the subject line.

2.2 DEQ 401 Certification Decision

Section 401 of the CWA allows DEQ to grant the certification, grant the certification with conditions, deny the certification, or waive certification (either expressly or by operation of law). Unless certification is waived by operation of law, DEQ will issue its certification decision in writing.

DEQ may grant certification with conditions. Under section 401(d), the certification may include any effluent limitations and other limitations and monitoring requirements necessary to ensure that the applicant for the federal license or permit will comply with applicable sections of the CWA, state WQS, and any other appropriate water quality requirement of state law. Conditions in accordance with 40 CFR 121.7(d) become a condition on the federal license or permit.

If DEQ denies certification in accordance with 40 CFR 121.7(e), the federal agency cannot issue the federal license or permit. Depending upon the circumstances and the applicable federal requirements and time lines, the applicant may request certification again. As explained below, this may be appropriate when insufficient information is provided to allow DEQ to make its certification decision.

DEQ cannot provide certification unless it has sufficient information to establish the discharge will comply with applicable sections of the CWA, state WQS, and any other appropriate water quality requirement of state law. DEQ will attempt to work with the federal agencies and applicants in order to receive adequate relevant information. However, DEQ may deny certification if such information is not provided in a timely manner. Alternatively, the applicant may choose to withdraw the request for certification in order to develop additional information and then reapply for 401 certification, dependent upon federal restrictions.

DEQ’s final decision regarding 401 certification may be appealed by the applicant or “other aggrieved person” under the Idaho Environmental Protection and Health Act (Idaho Code § 39-107(5)) and the Idaho Administrative Procedure Act. Such an appeal is a prerequisite to any district court action and must be initiated by filing a petition for a contested case in accordance

with the Rules of Administrative Procedure before the Board of Environmental Quality (IDAPA 58.01.23) within 35 days of the date of DEQ's decision regarding the 401 certification.

3 Guidance for Specific Permit Decisions

3.1 404 PERMITS

3.1.1 Federal Law and Regulations

CWA section 404 provides authority to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands. This authority is implemented by the ACOE.

The ACOE may issue individual or general permits (33 CFR 325.5(a)(1)). Within 15 days of receiving an application for an individual 404 permit, the ACOE must make a determination regarding whether the application is complete, and if the application is complete, the ACOE must issue a public notice of the receipt of a complete application (33 CFR 325.1(d) and 33 CFR 325.2(a)(2)).

If an individual certification is required, the applicant is responsible for submitting to DEQ a 401 certification request in accordance with 40 CFR 121.5(b) at least 30 days after submission of the pre-filing meeting request. The certification requirement will be deemed waived if the state does not act on the 401 certification request within 60 days of its receipt, unless the ACOE determines a shorter or longer period is reasonable for the state to act. If a longer period of time is determined reasonable, based upon information provided by the state, the ACOE may allow a longer period of time to certify, not to exceed one year (33 CFR 325.2(b)(1)(ii)).

3.1.2 DEQ 401 Certification Procedures

DEQ intends to provide the public with the opportunity to review and comment on draft 401 certification decisions. Because of the timelines established in the federal regulations, DEQ and the ACOE will not typically be able to run concurrent public notice processes. DEQ will issue its own public notice regarding certification decisions. DEQ certification procedures for activities authorized by 404 permits are outlined in the following narrative and flow chart.

Step 1. Under federal regulations at 40 CFR 121.4, an applicant must request a *pre-filing meeting* with DEQ at least 30 days prior by submitting a certification request by submitting the form to Certificationrequests@deq.idaho.gov with "Pre-Filing Meeting Request" in the subject line, and providing as much information available about the proposed project. DEQ will determine if a pre-filing meeting is appropriate, or if DEQ will waive the pre-filing meeting (40 CFR 121.4). Early involvement allows DEQ to identify potential water quality concerns and to work with the ACOE and the applicant in addressing those concerns. DEQ will work with the applicant and the ACOE to determine if the project is covered by a *Nationwide* or Regional permit that currently has a certification, in which case no additional approval from DEQ would be required.

Step 2. Federal regulations require the applicant to submit a complete *certification request*, which DEQ will review and determine if there is sufficient information to make a 401 certification decision. If the information is insufficient, DEQ will work with the applicant to obtain the additional information needed. The clock starts when DEQ receives a certification request that complies with 40 CFR 121.5. To comply with federal regulations, the certification request submitted for an individual license or permit must be written, signed, and dated (40 CFR 121.1(c)) and include the following information (40 CFR 121.5(b)):

1. The project proponent(s) and a point of contact;
2. Description of the proposed project;
3. The applicable federal license or permit;
4. The location and nature of any potential discharge that may result from the proposed project and the location of receiving waters;
5. A description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge;
6. include a list of all other federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed project, including all approvals or denials already received;
7. Documentation that a pre-filing meeting request was submitted to DEQ at least 30 days prior to submitting the certification request;
8. The request must contain the following statement: *'The project proponent hereby certifies that all information contained herein is true, accurate, and complete, to the best of my knowledge and belief'*; and
9. It must also contain the following statement: *'The project proponent hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time.'*

Step 3. If the project can be certified as proposed, DEQ will draft a certification. The time necessary for DEQ to complete the draft will depend on the complexity and size of the project. If the project cannot be certified as proposed, DEQ will issue a denial of certification.

Step 4. Once completed, the draft certification will be posted on DEQ's website for public comment for at least 21 days. A certification denial will be issued to the applicant and they have 35 days to appeal.

Step 5. At the close of the public comment period, DEQ will consider any comments received and will make a final 401 certification decision. The final certification decision will be posted on DEQ's website.

3.2 FERC Relicensing

3.2.1 Federal Law and Regulations

The Federal Power Act grants FERC authority to license non-federal hydroelectric projects located on navigable waters. Because such facilities include a discharge to surface water, a 401 certification is required for the issuance of the FERC license. In addition to the general federal

regulations for water quality certification at 40 CFR 121, FERC has adopted regulations for water quality certification under Title 18 of the Code of Federal Regulations.

Most hydroelectric projects in the United States are operating under a license that was issued for a period of 30 to 50 years. In order to operate beyond the original license period, the facility must obtain a new license from FERC. A number of facilities in Idaho are in or soon will be in the process of obtaining such a new license.

FERC regulations provide for several different relicensing processes, including the traditional licensing process, the integrated licensing process and the alternative licensing process. Under the traditional licensing process or integrated licensing process, within 60 days from the date of issuance of the notice of ready for environmental analysis, the applicant must provide FERC with either: (a) a copy of the state's 401 water quality certification; (b) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (c) evidence of waiver of certification (18 CFR 4.34(b)(5)(i) and 18 CFR 5.23(b)(1)). If the alternative licensing process is allowed, then 18 CFR 4.34(b)(5)(ii) provides that the applicant must provide FERC with the above-described information upon issuance of notice that FERC has accepted an application as provided in 18 CFR 4.32(d).

A state is deemed to have waived the certification requirements if the state has not granted or denied certification by one year after the date the state received a written request for certification (18 CFR 4.34(b)(5)(iii) and 18 CFR 5.23(b)(2)).

FERC provides no specific notice to the public that the state is considering 401 certification.

3.2.2 DEQ 401 Certification Procedures

DEQ intends to provide the public with the opportunity to review and comment on draft 401 certification decisions. Because FERC does not provide notice to the public, DEQ will issue its own public notice regarding certification decisions. DEQ certification procedures for hydroelectric facility licenses are outlined in the narrative below and in the attached flow chart.

Under federal regulations at 40 CFR 121.4, at least 30 days prior to submitting a certification request, the applicant must request a pre-filing meeting with DEQ by submitting a [meeting request](#) to Certificationrequests@deq.idaho.gov with "Pre-Filing Meeting Request" in the subject line, and providing as much information about the proposed project. DEQ will determine if a pre-filing meeting is appropriate, or if DEQ will waive the pre-filing meeting (40 CFR 121.4). Early involvement allows DEQ to identify potential water quality concerns and to work with the applicant in addressing those concerns.

The one-year deadline for issuing a 401 certification for a hydroelectric facility begins the day DEQ receives from the applicant a complete [certification request](#) within the meaning of 40 CFR 121.1(c). Within a reasonable time after receiving a request for certification (normally within 30 days), DEQ will provide notice to the public regarding the receipt of the request by posting the 401 certification request to the DEQ website.

The notice will also indicate the time lines for DEQ to issue a draft certification decision, for public comment and the opportunity to request a hearing as set forth below. The notice will also indicate where documents relating to the license and 401 certification can be reviewed by the public.

Ninety days prior to the one year date DEQ must provide its certification, DEQ shall provide notice to the public that it has made its preliminary decision regarding the 401 certification. If DEQ's decision is to issue a 401 certification, a copy of the draft certification will be posted on DEQ's website. The notice will be provided to the public in the manner described above. The notice will describe the public's opportunity for comment and the right to a hearing as described below.

The public may provide written comments to DEQ regarding the 401 certification. The comment period will last for 45 days after the date DEQ issues notice of its preliminary decision. Within 15 days of the date of notice of the preliminary decision, any person may request a public hearing or meeting in order to submit oral comments to DEQ. If DEQ determines a public hearing or meeting is appropriate, the meeting or hearing shall be held within the 45-day comment period, unless a later date is warranted.

DEQ will issue its final decision regarding the 401 certification within one year of the date DEQ received the request for certification. DEQ will provide notice to those parties that commented on the preliminary decision regarding its final decision and will post its final decision on DEQ's website.

4 Regional Office Contacts

Regional Office	Address	Phone Number	Email
Boise	1445 N. Orchard Rd., Boise 83706	208-373-0550	kati.carberry@deq.idaho.gov
Coeur d'Alene	2110 Ironwood Parkway, Coeur d'Alene 83814	208-769-1422	chantilly.higbee@deq.idaho.gov
Idaho Falls	900 N. Skyline, Suite B., Idaho Falls 83402	208-528-2650	troy.saffle@deq.idaho.gov
Lewiston	1118 "F" St., Lewiston 83501	208-799-4370	sujata.connell@deq.idaho.gov
Pocatello	444 Hospital Way, #300 Pocatello 83201	208-236-6160	matthew.schenk@deq.idaho.gov
Twin Falls	650 Addison Ave. W., Suite 110, Twin Falls 83301	208-736-3877	sean.woodhead@deq.idaho.gov
State Office	1410 N. Hilton Rd., Boise 83706	208-373-0158	elizabeth.spelsberg@deq.idaho.gov

References

DEQ (Idaho Department of Environmental Quality). 2020. "Water Quality Standards." IDAPA 58.01.02. <https://adminrules.idaho.gov/rules/current/58/580102.pdf>

EPA (United States Environmental Protection Agency). "Clean Water Act Section 401 Certification Rule." 40 CFR 121. https://www.epa.gov/sites/production/files/2020-07/documents/clean_water_act_section_401_certification_rule.pdf

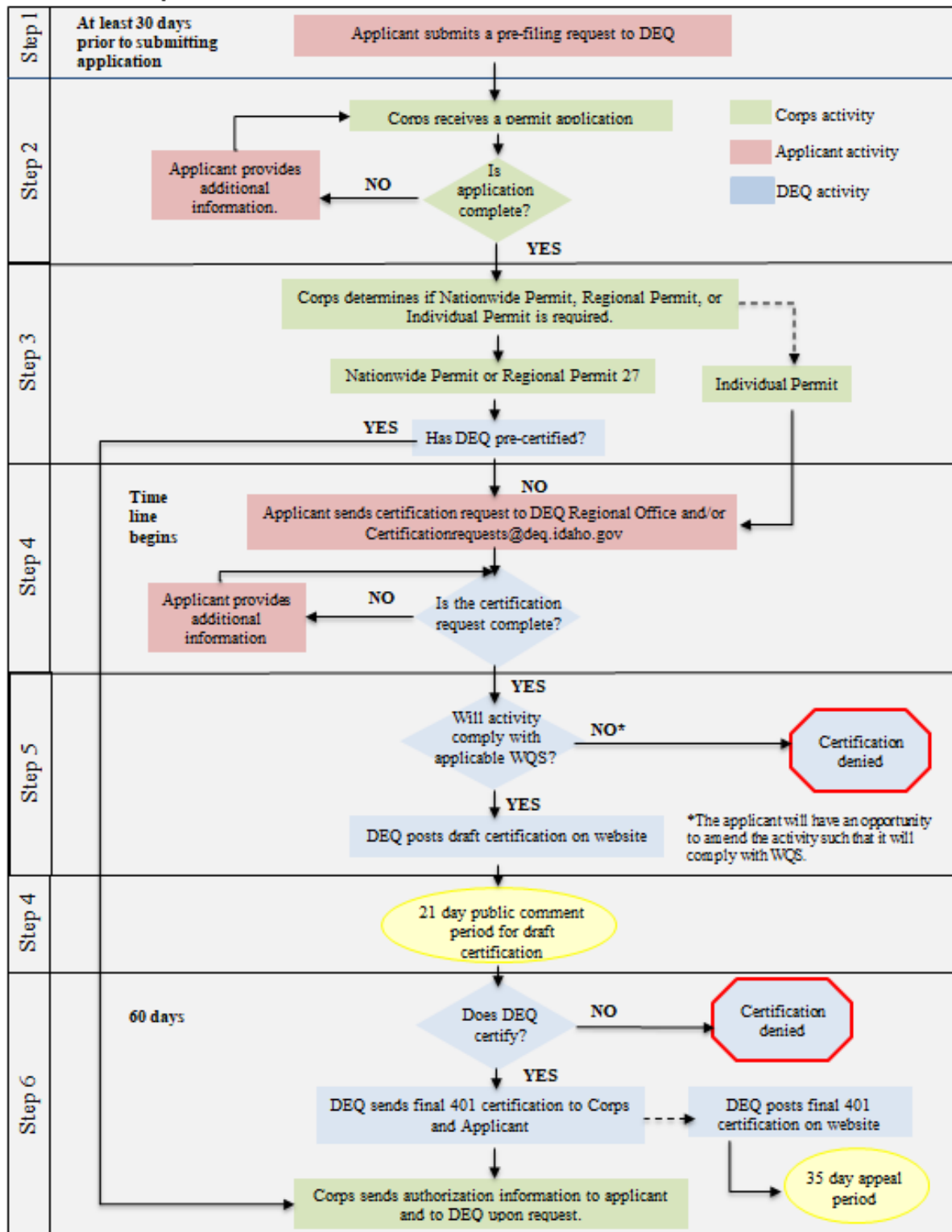
EPA (United States Environmental Protection Agency). 1972. Clean Water Act. 33 U.S.C. § 1251 et seq.

EPA (United States Environmental Protection Agency). National Pollutant Discharge Elimination System (NPDES). <https://www.epa.gov/npdes>

FERC (Federal Energy Regulatory Commission, Department of Energy). "Conservation of Power and Water Resources." 18 CFR Chapter I. <https://www.law.cornell.edu/cfr/text/18/chapter-1>

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401 Certification Process for 404 Permits



FERC 401 Certification Process

