

**Vermont Agency of Natural Resources  
Department of Environmental Conservation  
Watershed Management Division**

**Section 401 Water Quality Certification Procedure**

**A. Background and Purpose**

1. Section 401 of the federal Clean Water Act (CWA), 33 USC §1341, provides that an applicant for a Federal license or permit to conduct any activity which may result in a discharge into waters of the United States shall provide the federal licensing or permitting agency a certification from the state in which the discharge will originate that the discharge will comply with Sections 301, 302, 303, 306 and 307 of the CWA. Once §401 review is triggered, the conditions and limitations included in a §401 certification may address the permitted activity as a whole. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994).
2. Under §401, a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the United States unless the state in which the discharge occurs has granted or waived certification. A state denial of certification prohibits the federal permit or license from being issued.
3. Pursuant to 10 V.S.A. §1004, the Secretary of the Vermont Agency of Natural Resources (Secretary) is the certifying agency of the State of Vermont for purposes of §401. The Secretary has delegated this authority to the Commissioner of the Vermont Department of Environmental Conservation (Commissioner), who has in turn delegated this authority to the Director of the Department's Watershed Management Division (Director). In certain cases, the Commissioner may decide to retain his or her decision-making authority over a §401 application. In those cases, the Commissioner will apply this Procedure during his or her review of the application.
4. It is the goal of this Procedure to ensure a consistent application, review and decision-making process that provides adequate public notice and opportunity to comment with respect to the Director's §401 certification decisions. This Procedure includes the requirements for §401 certification set forth in Section 13.11 of the Vermont Water Pollution Control Regulations (February 26, 1974).

**B. General Requirement to Obtain §401 Certification**

1. An applicant for a federal license/permit to conduct an activity that will result in a discharge to waters of the United States is required to obtain a §401 certification or

waiver prior to the issuance of the federal license/permit. Examples of federal permits/licenses that may require §401 certification include, but are not limited to:

- i. a permit from the U.S. Army Corps of Engineers (USACE) pursuant to §9 or §10 of the Rivers and Harbors Act for work or structures in or affecting navigable waters;
  - ii. a permit from the USACE pursuant to §404 of the CWA for the placement of fill or discharge of dredged materials into waters of the United States;
  - iii. a Federal Energy Regulatory Commission (FERC) hydropower license;
  - iv. although FERC does not require a §401 certification before acting on a FERC exemption application, the Secretary deems certification necessary to fulfill the Secretary's obligations in the FERC process as a fish and wildlife resource agency;
  - v. a discharge permit issued by the U.S Environmental Protection Agency (EPA) pursuant to §402 of the CWA and the National Pollutant Discharge and Elimination System (NPDES) program for a point source discharge of pollutant(s) into waters of the United States;
  - vi. licenses issued by the Nuclear Regulatory Commission (NRC); and
  - vii. any other federal license or permit to conduct any activity, including, but not limited to, the construction or operation of facilities, which may result in any discharge into waters of the United States.
2. It is the responsibility of a project proponent to determine which federal permits/licenses, if any, are applicable to its proposed project and whether §401 certification is required.
  3. In certain cases, the Director may determine that if a project meets the requirements of a state-issued (e.g. stream alteration permit, wetlands permit) a separate §401 certification is not required and may waive such certification. The Director may identify certain categories of projects in state-issued general permits that are waived from the requirement to obtain a §401 certification if the project meets the general permit requirements.

### **C. Certification Application Requirements – General Permits and Individual Permits**

1. Certifications Associated with Federally-issued General Permits

- i. In certain cases, a federal licensing/permitting agency may issue a general permit, for which the Director may grant general certification or waiver for certain categories of discharges. If a project falls within one of the specified categories of discharges, the applicant does not need to seek an individual certification from the Director as long as the project complies with the conditions of the general permit. If a proposed discharge is not eligible for general certification or a waiver under the general permit, then the applicant must apply for an individual certification in accordance with Section C.2 of this Procedure.
  - ii. A §401 certification is required only when a federal agency is issuing a federal permit. When the Department implements a federal program through delegation (e.g. Vermont's federally-delegated NPDES permit program) a project proponent does not need to apply for a separate §401 certification or waiver.
2. Application for Individual Certifications (except FERC projects)
  - i. An applicant for a federal license/permit shall file a request for §401 certification on a form provided by the Director, which is available at [www.vtwaterquality.org](http://www.vtwaterquality.org). The application form shall request, at a minimum, the following:
    - a. information sufficient to determine that the proposed discharge will comply with the applicable provisions of §§301, 302, 303, 306, and 307 of the federal Clean Water Act, the Vermont Water Quality Standards, and other appropriate requirements of state law;
    - b. a complete description of the proposed activity, including the location, affected waterbody(s), purpose and intent of the project;
    - c. the manner, volume, nature, frequency and duration of the proposed discharge;
    - d. alternatives considered and any proposed mitigation;
    - e. maps, drawings, and plans sufficient for review purposes; and
    - f. such additional information deemed necessary by the Director.
  - ii. A person seeking to change, alter or modify the course, current or cross section of any perennial stream, either by movement or fill, or by excavation of ten cubic yards or more, whose proposed discharge is not eligible for general certification or waiver under either the USACE §404 general permit or Vermont Stream Alteration General Permit, shall apply for an individual stream alteration permit pursuant to 10 V.S.A. §1022. The Director may,

upon issuing the individual permit, elect to waive an individual §401 certification. Where the Director does not waive certification, the applicant shall file a request for §401 certification as specified in C.2. above.

3. Application for Certification in Connection with a FERC license or Exemption

- i. An applicant for a FERC license or exemption shall file a request for §401 certification on a form provided by the Director, which is available at [www.vtwaterquality.org](http://www.vtwaterquality.org). In addition to information on the application form, additional supporting information shall be provided as follows:
    - a. *FERC licensed projects using the Traditional Licensing Process (TLP):* license application and any responses to any FERC additional information requests.
    - b. *FERC licensed projects using the Integrated Licensing Process (ILP):* license application.
    - c. *FERC exempt projects:* exemption application and the results of any environmental studies completed as part of the FERC process.
  - ii. For certifications requested in connection with a FERC license or exemption, the timing of the application should be coordinated with the applicable FERC process.
    - a. *FERC licensed projects using the TLP*  
Applicants that are using the TLP (18 CFR §4.38 et seq.) may file a certification application following issuance of a Notice of Ready for Environmental Analysis (NEPA review) by FERC.
    - b. *FERC licensed projects using the ILP*  
Applicants that are using the ILP (18 CFR §5.1 et seq.) may file a certification application as early as the date the FERC license application is filed.
    - c. *FERC exempt projects*  
Applicants may only file a certification application after results from all studies necessary to support the application are available and a complete project proposal has been developed.
4. Prior to making a decision on an application for certification, the Director may require that the applicant perform various studies or environmental quality tests including, but not limited to, chemical analyses of water, sediment or fill material, bioassays, and assessments of habitat suitability. The Director may also require the applicant to

submit additional information pursuant to Vermont's Anti-Degradation policy and any anti-degradation procedure or rule in effect at the time of application.

5. Pursuant to 3 V.S.A. §2809, the Secretary may require an applicant to pay the cost of research, scientific or engineering expertise or services that the Agency does not have when such expertise or services are required for the processing of the §401 application.
6. The applicant bears the burden of proof in the application process. The applicant must provide the Director with sufficient information upon which to make the affirmative findings required by law. The Director may require an applicant to supplement its application, including the execution of special studies as necessary, to provide sufficient information for the Director to make a §401 decision.

#### **D. Determination of Administratively Complete Application**

1. Within two weeks of receipt of an application, the Division will review the application and determine whether it is administratively complete. An "administratively complete application" is an application that has been determined to include all of the initially required documentation necessary to conduct a technical review of the application. These documents include, but are not limited to, the correct application form(s) and supporting information, signatures and fees.
2. If an application is determined to be administratively complete, a letter will be issued to the applicant indicating the date of receipt of the application and its administrative completeness.
3. If an application is determined to be administratively incomplete, the applicant will be contacted via phone, email or letter, and informed of the materials needed to make the application administratively complete. If the requested information is not provided within thirty (30) days, the application may be denied without prejudice and the applicant may reapply at any time. The notice of denial will be provided via email or letter. The Director may extend this thirty (30) day period at his/her sole discretion.

#### **E. Determination of Technically Complete Application**

1. For purposes of this procedure a "technically complete" application means that an application contains a material record sufficient to support the drafting of a tentative decision for public notice purposes.
2. Applications for Certification in Connection with Federal Permits/Licenses
  - i. Within thirty (30) days after receipt of an application, the Director will notify the applicant whether the application is technically complete. The Director may extend the 30 day period at his or her sole discretion.

- ii. If an application is deemed technically incomplete, the Director will notify the applicant with sufficient detail to identify the information or materials necessary to complete the application. At the Director's discretion, no further processing of the application will take place until the information requested by the Director is received and determined to be technically complete. If the requested information is not provided within twenty (30) days, the application may be denied without prejudice and the applicant may reapply at any time. The notice of denial will be provided via email or letter. The Director may extend this 30 day period at his or her sole discretion.
- iii. Prior to making a determination on the technical completeness of an application:
  - a. Division staff in receipt of the application will notify all Division program managers of the application. The Director and Division managers will designate a lead Division program manager for the §401 application. The lead Division manager will ensure coordination in evaluating the technical completeness of the application.
  - b. The lead Division manager will ensure coordination with other affected Agency departments as follows:
    - (1) Upon receipt of an application, the lead Division manager will promptly provide written notification via email to other affected Agency departments of receipt of the application and provide a copy of the application, if requested. A copy of this notification will also be provided via email to the Director.
    - (2) The lead Division manager will specify in this notification a date by which other affected departments must respond to the Division as to whether the application is complete for their purposes or identify any additional information that is needed.
    - (3) If the lead Division manager determines that other Agency departments are not able to meet the specified deadline for response, the manager will notify the Director. The Director will work with the manager, the Commissioner, and others as necessary to promptly resolve any timing issues. Any disagreement among or between Agency departments should be identified early and brought to the Secretary if they cannot be promptly resolved at the Department level.
  - c. The lead Division manager shall ensure coordination with affected outside entities (e.g. EPA, USACE).

- d. For projects on border waters and projects that may affect border or downstream waters in another state, the lead Division manager shall notify the border or downstream state and EPA and coordinate with these entities, as appropriate.
- 3. Special Provisions for Applications for Certification in Connection with a FERC License or Exemption
  - i. The Director will process certain applications in connection with a FERC license or exemption within 120 days after a determination that an application is technically complete and Agency staff has had an opportunity to conduct a site visit at an appropriate time of year and flow conditions. Projects qualifying for an expedited process are:
    - a. Run-of-river projects at existing dams (no change to extent of impoundment) where the proposal provides bypass flows consistent with the default hydrologic standards (Vermont Water Quality Standards Section 3-01(C)), and the proposal does not impact on existing or designated uses or water quality criteria;
    - b. Run-of-river projects at existing dams (no change to extent of impoundment) with short bypasses having the following characteristics:
      - (1) Very low habitat value (e.g., very steep with prominent ledges), or
      - (2) Consisting solely of one or more pools with minimal flow needs to provide for movement of fish and to maintain water quality and aquatic habitat, and
      - (3) The project site does not have aesthetic or recreational values (e.g., for some waterfalls) or provide habitat for threatened or endangered species;
    - c. Conduit projects which are physically removed from state and federal waters and have no impact on water quality;
    - d. Projects for which a 5 MW exemption application has been filed and accepted by FERC.
  - ii. The USACE regulates certain activities at hydroelectric projects, primarily construction, maintenance and repair activities, under CWA §404 or §10 of the Rivers and Harbors Act of 1899. These activities are subject to permitting under either an individual permit or the USACE Vermont General Permit, depending on the scope and impact of the project. For hydroelectric projects, a single certification will be issued covering both FERC and USACE authorizations. For new hydroelectric projects, applicants should include the USACE in the FERC pre-filing consultation process to help assure that the

project design will not be subject to significant changes in order to obtain a USACE permit.

4. The Director may at any time require an applicant to submit any additional information that the Director considers necessary in order to make a determination that an application is technically complete. The application may be denied without prejudice if any requested information is not provided within sixty (60) days of the Director's request, unless this time period is extended by the Director at his or her sole discretion.

#### **F. Timeframe for Decision-Making**

1. Section 401 provides that a 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 shall be automatically waived. Once an application is deemed technically complete by the Director, the decision-making "clock" starts, and the Director must make his or her final §401 decision within a time period set by the involved federal agency. Different federal agencies have defined in regulation what constitutes a "reasonable period of time" for state decision-making (e.g. for both NPDES permits and §404 permits states generally have sixty (60) days to provide certification decisions, unless the federal agency agrees a longer period of time for certification is warranted; for FERC licenses, states have one year to make a certification decision after receipt of an application). However, federal regulation gives flexibility to the federal agency to either shorten or lengthen the time period for the Director's final decision.
2. In order to avoid an inadvertent waiver of §401 certification, the lead Division manager shall contact each involved federal agency either before or at the time a §401 application is deemed technically complete under this Procedure in order to determine the federal timeframe for the Director's final §401 decision. The lead Division manager shall request that each federal agency provide this deadline in writing.
3. In cases where the Director needs more time to make a final §401 decision and the involved federal agency will not grant sufficient time, the lead Division manager shall inform the Director. In order to avoid a waiver or denial of certification, the Director may suggest to the applicant that it withdraw and resubmit its application for certification, thereby restarting the certification clock, or deny the certification without prejudice when there is insufficient information to make a final decision and encourage the applicant to resubmit the application.

#### **G. Coordination in Formation of Tentative Determination on §401 Application**

1. Prior to issuing a tentative determination on the §401 application for public comment, the Director will ensure appropriate coordination with other affected Agency departments as follows:

- i. Prior to issuing a draft tentative determination for public notice, the draft will be provided to other affected Agency departments with a specified period of time to comment. Upon consideration of comments from other affected Agency departments, the draft tentative determination will be finalized and sent to the Commissioner for review.
- ii. If the Director determines that other Agency departments are not able to meet the specified deadline for comment, the Director and lead Division manager will work with the Commissioner, and others to resolve any timing issues. Any disagreement among or between Agency departments should be identified early and brought to the Secretary if they cannot be promptly resolved at the department level.
- iii. The lead Division manager will ensure that comments of other Agency departments are considered prior to the issuance of a tentative determination for public comment, and shall coordinate meetings and discussions as needed. In the case of any conflicts or disagreements among or between Departments, the Director will work with the lead Division manager, the Commissioner, and others as necessary to promptly resolve any disagreements. Any disagreement among or between Agency departments should be identified early and brought to the Secretary if they cannot be promptly resolved at the department level.

## **H. Public Notice**

1. The Director shall give notice of and provide opportunity for written comments regarding the proposed discharge and the tentative determination to issue or deny certification. The public notice shall include at least the following:
  - i. Name, address, phone number of the Director;
  - ii. Name and address of each applicant;
  - iii. Brief description of each applicant's activities or operations which will result in the discharge described in the application;
  - iv. Name of the water to which each discharge will be made and a short description of the location of the discharge and whether it is a new or existing discharge;
  - v. A statement of the tentative determination to issue, issue with conditions or deny the certification;
  - vi. A brief description of the procedures for the formulation of final determinations, including public comment opportunities;
  - vii. A statement that the certified discharge will comply with Vermont's Anti-Degradation Policy and describe how the public can obtain copies of materials prepared in support of the anti-degradation review; and

- viii. The address, phone number and email address, if any, of where interested persons may obtain further information, request a copy of the tentative determination and inspect and copy forms and related documents.
2. The public notice shall be mailed or emailed to the clerk of the municipality in which the proposed discharge will occur for posting, shall be posted on the Agency's website and the Division's website and shall be mailed or emailed to any person or group on an interested parties list. The Director shall add the name of any person or group upon request to a mailing list to receive copies of notices of notices of all applications within Vermont or within a certain geographic area.
3. The Director shall provide a period of time not less than thirty (30) days following the date of the public notice during which time interested persons may submit their written comments on the Director's tentative determination. All written comments submitted during the public comment period shall be retained by the Director and considered in the formulation of the final determinations with respect to the application. The period for comment may be extended at the discretion of the Director.
4. At his/her discretion, the Director may provide the public comments to the applicant and furnish the applicant with an opportunity to respond before a final decision is made. If the Director does so, the Director will formally extend the public comment period and so notify those participating in the process, and those participants may elect to respond to any comments filed by the applicant in the first round. The scope, however, shall not include new issues unless manifest injustice would otherwise occur.
5. The Director may also upon a written request or at his/her own discretion extend the deadline for comments if such action is deemed to enhance public participation or for other reasonable cause. Any request for an extension must occur during the original comment period, must include a proposed deadline, and shall include compelling justification for extending the public comment period. The Director shall not grant a request for extension if it will extend the comment period beyond the timeframe set for the Director's final §401 decision by the involved federal agency.

## **I. Public Hearing**

1. The Director shall provide an opportunity for the applicant, any affected Vermont agency, any affected interstate agency, any affected country, the EPA Regional Administrator or any interested agency, person, or group to request or petition for a public hearing with respect to an application. Any request for a public hearing shall be

filed within the initial public comment period and shall indicate the interest of the party filing such request and the reasons why a hearing is warranted.

2. The Director shall hold a hearing if there is a significant public interest in holding a hearing. Instances of doubt shall be resolved in favor of holding the hearing. Any hearing shall be held in the geographical area of the proposed discharge or other appropriate area, at the discretion of the Director. If the Director determines that useful information or data may be obtained, the Director may hold a public hearing any time prior to the issuance or denial of a certification. Notice shall be given as described in Section H of this Procedure.
3. At his/her discretion, the Director may notice a public hearing at the same time that he/she notices the tentative determination and hold the public hearing during the initial public comment period.
4. Public notice of any hearing shall be circulated at least as widely as was the notice of the application. Public notice shall be given at least thirty (30) days in advance of the hearing and shall include at least the following:
  - i. Notice in at least one newspaper of general circulation within the geographical area of the discharge;
  - ii. Notice to all persons and government agencies which received a copy of the notice of application;
  - iii. Notice to the clerk of the municipality in which the proposed discharge will occur for posting;
  - iv. Posting on the Agency's website and on the Division's website; and
  - v. Notice shall be mailed to any person or group on an interested parties list.
5. The public notice of any hearing shall include at least the following:
  - i. Name, address, and phone number of the Department;
  - ii. Name, address of each applicant;
  - iii. Name of water to which each discharge is made and a short description of the locate of each discharge on the waterway;
  - iv. A brief reference to the public notice issued for the application, including the identification number and date of issuance;
  - v. Information regarding the time and location for the hearing;
  - vi. The purpose of the hearing;
  - vii. A concise statement of the issues raised by the persons requesting the hearing;

- viii. The address, phone number, and email address, if any, of where interested persons may obtain further information, request a copy of the tentative determination and inspect and copy forms and related documents; and
  - ix. A brief description of the nature of the hearing.
6. Any person shall be permitted to submit oral or written statements and data concerning the application and proposed activity. The Director shall have discretion to fix reasonable limits on the time allowed for oral statements and may require the submission of statements in writing.

#### **J. §401 Certification Decision**

1. The Director may at any time require an applicant to submit any additional information that the Director considers necessary in order to make a final §401 determination. The application may be denied without prejudice if any requested information is not provided within sixty (60) days of the Director's request, unless this time period is extended by the Director at his or her sole discretion.
2. After consideration of public comments on the draft tentative determination, the Director may take one of the following actions under §401:
  - i. *Grant.* A grant of §401 certification signifies that the Director has determined that there is reasonable assurance that the activity will be conducted in a manner which will not cause a violation of Vermont Water Quality Standards and will be in compliance with §§301, 302, 303, 306, and 307 of the federal Clean Water Act, 33 U.S.C. §1251 et seq., as amended, and other appropriate requirements of state law;
  - ii. *Grant with Conditions.* The Director may include limitations or conditions in a certification as necessary to ensure compliance with applicable federal Clean Water Act requirements, Vermont's Water Quality Standards, and other appropriate requirements of state law.
  - iii. *Deny.* The Director may deny certification, with or without prejudice, if there is not a reasonable assurance that the activity will not cause a violation of Vermont Water Quality Standards and will be in compliance with §§301, 302, 303, 306, and 307 of the federal Clean Water Act, 33 U.S.C. §1251 et seq., as amended, and other appropriate requirements of state law;
    - a. In the event that the Director denies an application for certification or for any reason is unable to approve the application, the Director shall

so notify the applicant, specifying in such notification the reasons for the denial or inability to approve;

- b. Prior to denial of a certification, the Director may hold one or more meetings to inform the applicant of the preliminary decision to deny certification and to allow the applicant to make necessary modification to the project leading toward certification approval, if possible.
3. Waivers. The Director may waive certification, either explicitly, through notification to the applicant, or by not taking action. Under the federal Clean Water Act, a waiver by the Director does not indicate the Director's substantive opinion regarding the water quality implications of a proposed activity or discharge. The Director may waive certification for a variety of reasons, including a lack of resources to evaluate the application.

#### **K. Scope of Review for Application Decisions**

1. In assessing the water quality impacts of a proposed discharge and activity, the Director may, at a minimum, consider the following factors:
  - i. The intended purpose of the discharge and activity;
  - ii. Whether there are feasible alternatives to the discharge or activity;
  - iii. Any proposed mitigation if impacts cannot be avoided or minimized;
  - iv. The magnitude of any proposed impact;
  - v. All potential water quality and aquatic resource impacts of the project, both direct and indirect, over the life of the project, including but not limited to:
    - a. Impact on existing and designated uses;
    - b. Degree of physical, chemical and biological impacts on waters of the state;
    - c. Impact on fish and other aquatic biota and wildlife and associated habitat;
    - d. Degree of alteration of the aquatic ecosystem;
    - e. Degree of consistency with water quality management plans, basin plans and TMDLs;
    - f. The effect on circulation patterns, stream flow and water movement;
    - g. The cumulative impacts of the proposed discharge and activity;
    - h. Reasonably foreseeable similar activities of the applicant and others;
    - i. Aesthetics;
    - j. Erosion;
    - k. Stormwater management
    - l. Impacts to wetlands, headwater wetlands and streams

- m. Impacts to riparian and littoral zones;
    - n. Impact on recreational access and use
    - o. Impacts to groundwater; and
    - p. Any other factors deemed necessary by the Department to protect water quality and aquatic resources.
2. The Director may issue a certification or certification with conditions, if he or she finds that there is reasonable assurance that the proposed activity will not violate:
- i. §301 (effluent guidelines), §302 (water quality related effluent limitations), §303 (water quality standards), §306 (national new source performance standards) or §307 (toxic and pretreatment effluent standards) of the federal Clean Water Act;
  - ii. the Vermont Water Quality Standards, including but not limited to numeric and narrative criteria, management objectives applicable to the classification of the affected waters, designated and existing uses, and Vermont’s Anti-degradation Policy; and
  - iii. any other appropriate requirements of state law.
3. For purposes of this Procedure “other appropriate requirements of state law” include, but are not limited to:
- i. Agency rules, procedures and policies that implement the Vermont Water Quality Standards, including but not limited to:
    - a. Acceptable Minimum Stream Flow Procedure
    - b. Mixing Zone Policy
    - c. Water Withdrawals for Snowmaking Rule;
    - d. Anti-degradation Implementation Procedure or Rule;
  - ii. The following chapters in Title 10 of the Vermont Statutes Annotated and implementing regulations, rules, procedures, and policies:
    - a. Chapter 37 relating to Wetlands Protection and Water Resources Management;
    - b. Chapter 41 relating to Regulation of Stream Flow;
    - c. Chapter 43 relating to Dams;
    - d. Chapter 47 relating to Water Pollution Control;
    - e. Chapter 48 relating to Groundwater Protection;
    - f. Chapter 49 relating to Protection of Navigable Waters and Shorelands;
    - g. Chapter 50 relating to Aquatic Nuisance Control;

- h. Chapter 56 relating to Public Water Supply;
  - i. Chapter 123 relating to Endangered Species;
  - j. Chapter 159 relating to Waste Management;
- iii. Title 29, Chapter 11, relating to management of Lakes and Ponds, and implementing rules, procedures and policies;
  - iv. Applicable Total Maximum Daily Loads and Water Quality Remediation Plans;
  - v. Applicable basin plans and watershed plans;
  - vi. All laws reasonably related to the State's interest in waters of the State, including but not limited to recreational uses (e.g. park use, sports fishing, boating, swimming) and water supply.
4. The Director will deny a certification when any of the following determinations are made:
- i. There is not a reasonable assurance that the proposed activity will not violate any of the provisions listed in Section K.2 above;
  - ii. There is a feasible alternative to the activity, which reduces adverse consequences on water quality and designated or existing uses;
  - iii. The proposed activity in conjunction with other activities may result in unacceptable adverse cumulative impacts; or
  - iv. The Director is not assured that appropriate and practical steps will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.
5. Certifications issued in accordance with this Procedure shall only apply to the specific activity for which application is being made. Initial certification shall apply to construction and operation of the project. Subsequent activities needing a federal permit at a specific project site may need a separate certification or amendment, whichever is determined appropriate by the Director, unless the activity is subject to review and approval under a condition of the initial certification or an amendment of that certification.

#### **L. Content of Certification Decision**

- 1. A certification decision issued by the Director shall contain at a minimum:
  - i. The name and address of the applicant;

- ii. A statement of the record upon which the decision is based;
- iii. A statement that the Director has examined:
  - a. the application made to Director for a certification;
  - b. the application made to the federal licensing or permitting agency (specifically identifying the number or code affixed to such application) and bases his or her decision upon an evaluation of the information contained in such application that is relevant to the Director's responsibilities under §401; and
  - c. other information furnished by the applicant and other relevant information sufficient to permit the Director to make the statement described in L.1.iv. below;
- iv. A statement that the certification is granted or denied and that either there is or is not reasonable assurance that the activity will be conducted in a manner which will not cause a violation of Vermont Water Quality Standards and will be in compliance with §§301, 302, 303, 306, and 307 of the federal Clean Water Act, 33 U.S.C. §1251 et seq., as amended, and other appropriate requirements of state law;
- v. Conditions needed to assure compliance with federal law, including but not limited to §§301, 302, 303, 306, and 307 of the federal Clean Water Act, the Vermont Water Quality Standards, and other appropriate requirements of state law. Such conditions may include, but are not limited to, requirements for stream flow and water level management, fish passage, fish stocking, stormwater management, vegetated buffers, control of weeds and pests, best management practices (BMPs), public access and recreation, water quality monitoring and erosion prevention and sediment control measures;
- vi. A condition vesting the Department with the authority to reopen and alter or amend the certification conditions over the life of the project when such action is necessary to assure compliance with Vermont Water Quality Standards and to respond to any changes in classification or management objectives for the affected waters;
- vii. A condition stating that authorized representatives from the Agency, at reasonable times and upon presentation of credentials, may enter upon the site

where the activity is taking place for purposes of inspecting and determining compliance with any certification conditions;

- viii. The signature of the Commissioner of the Vermont Department of Fish & Wildlife, or his or her designee, stating that he or she has reviewed the final certification decision.

#### **M. Effective Date and Expiration of Certification**

1. Certifications become effective on the date of issuance, and the conditions of any certification become conditions of the federal license or permit (33 U.S.C. §1341(d)). If the federal authority denies a license or permit, the certification becomes null and void. Otherwise, it runs for the term of the federal license or permit.

#### **N. Enforcement**

1. Upon receipt of information that water quality standards are being violated as a consequence of the project's construction or operation or that one or more certification conditions have not been complied with, the Director, after consultation with the permittee and notification of the appropriate federal permitting agency, may, after notice and opportunity for a public hearing, modify the certification and provide a copy of such modification to the permittee and the federal permitting agency.
2. Certification conditions which are included as conditions are subject to enforcement mechanisms available to the federal agency issuing the license or permit and to the State of Vermont. Other mechanisms under Vermont 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.

#### **O. Appeals**

1. *Renewable Energy Projects.* The Director's final certification determination in connection with a renewable energy plant for which a certificate of public good is required under 30 V.S.A. §248, must be filed with the Vermont Public Service Board pursuant to 10 V.S.A. §8506. This section does not apply to a facility that is subject to 10 V.S.A. §1004 (dams before the Federal Energy Regulatory Commission), 10 V.S.A. §1006 (certification of hydroelectric projects) or 10 V.S.A. Chapter 43 (dams); these appeals are to the Environmental Court in accordance with L.2 of this Procedure.

2. *All other Projects.* The Director's final certification determination on all other projects shall be considered final action by the Director appealable to the Vermont Environmental Court in accordance with 10 V.S.A. Chapter 220.

A handwritten signature in black ink, appearing to read "Pete LaFlamme", written over a horizontal line.

Pete LaFlamme, Director  
Watershed Management Division

Date: April 2, 2012