

Reclamation Manual

Directives and Standards

Subject:	Non-Agricultural Discharges into Bureau of Reclamation Facilities – Requirements and Procedures for Obtaining Authorization from Reclamation
Purpose:	To ensure that authorizations for non-agricultural stormwater and other non-agricultural discharges into Reclamation facilities address appropriate Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit requirements and other relevant considerations. The benefits of this Directive and Standard (D&S) for Reclamation are the protection of resources and facilities and the prevention of unnecessary Reclamation costs.
Authority:	Reclamation Project Act of 1939, Section 10 (43 U.S.C. 387); Use of Reclamation Lands, Facilities, and Water Bodies (43 CFR part 429); Law Enforcement Authority at Bureau of Reclamation Projects (43 CFR part 422).
Approving Official:	Director, Policy and Administration
Contact:	Reclamation Law Administration Division, 84-55000

1. **Introduction.** Reclamation manages, operates, and maintains facilities that support various water uses in the western United States, in particular irrigated agriculture, consistent with Congressional authorizations of Reclamation projects. Urban development near Reclamation projects has increased requests from municipalities and other entities to discharge non-agricultural water, such as stormwater or treated municipal wastewater, into Reclamation facilities such as canals or ditches. When a determination is made by Reclamation that a proposed discharge into its facilities will not be detrimental to the best interests of the United States and any transferred works operating entities, Reclamation has discretion to accept that discharge. However, Reclamation is not obligated to accept such discharges, and it is in Reclamation’s interest to maintain the exemptions from NPDES permit requirements applicable to its own water releases. This D&S establishes the minimum requirements to be evaluated and addressed prior to making any determinations of whether to allow the discharge of non-agricultural source waters into Reclamation facilities, and identifies procedures for addressing unauthorized discharges.
 - A. **Clean Water Act Permitting Requirements and Exemptions.** The Clean Water Act (33 U.S.C. 1251 et seq.) establishes permit requirements for the discharge of a pollutant into waters of the United States¹. Return flows from irrigated agriculture and agricultural stormwater discharges are specifically excluded from the Clean Water Act’s definition of “point source”, and thus do not require NPDES permits².

¹33 U.S.C. 1342.

²33 U.S.C. 1342 (l)(1); 33 U.S.C. 1362 (14); 40 CFR 122.2 and 122.3(e) and (f). In the state of California, some Regional Water Boards regulate agricultural discharges through the use of conditional waivers.

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Non-exempted point-source discharges, including certain stormwater discharges, must obtain and comply with the terms of an NPDES permit to satisfy the Clean Water Act.

- B. Mixed Agricultural and Non-Agricultural Discharges.** A Clean Water Act permitting authority (e.g., state or U.S. Environmental Protection Agency) may require an NPDES permit for a non-agricultural discharge either at the point the water enters a Reclamation facility, or at the point the non-agricultural discharge, possibly commingled with waters exempt from NPDES permit requirements, otherwise enters waters of the United States. Reclamation can reduce the likelihood that flows conveyed through its facilities will be subject to NPDES permit requirements by making certain that all Reclamation-authorized non-agricultural discharges into its facilities have received and comply with appropriate NPDES permit coverage.³
2. **Applicability.** This D&S is applicable to all employees in regional and area offices with operation and maintenance (O&M) responsibilities for Reclamation project facilities, including all transferred and reserved works. This D&S establishes requirements related only to Clean Water Act NPDES permit compliance for non-agricultural discharges into Reclamation facilities. Other non-NPDES-related considerations associated with such discharges, including other water quality concerns and applicable state-specific regulations, are the responsibility of the corresponding region to address.
3. **Definitions.** For purposes of this D&S, the following definitions apply:
- A. **Applicant.** An applicant is any person or entity (such as a private citizen, business, non-governmental organization, public entity, Indian tribe, or foreign government) who submits an application requesting use of Reclamation land, facilities, or waterbodies.⁴
- B. **Non-Agricultural Discharge.** Non-agricultural discharge is any discharge that is not covered by the Clean Water Act exemption for return flows from irrigated agriculture and agricultural stormwater discharges⁵.
- C. **Reclamation Facility.** A Reclamation facility means any facility under Reclamation jurisdiction. The term includes, but is not limited to, canals, dams, ditches, drains, fish and wildlife facilities, laterals, pumping plants and reservoirs.

³The procedures articulated in this D&S are intended to address NPDES permitting concerns associated with Reclamation operations; these procedures are not intended to address, resolve, or otherwise concede the question of whether and under what circumstances Reclamation facilities constitute 'waters of the United States'. Such determinations for Reclamation facilities must be made on a case-by-case basis, considering the facts and circumstances specific to that case, and in conformance with applicable federal law, rules, and guidance.

⁴This definition is taken from 43 CFR 429.2. The same subpart defines "public entity" as "States, political subdivisions or agencies thereof; public and quasi-governmental authority and agencies; and agencies of the Federal government".

⁵These exemptions (established by excluding these waters from the Clean Water Act's definition of "point source") are described under 33 U.S.C. 1342 (l)(1); 33 U.S.C. 1362 (14); and 40 CFR part 122.

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- D. **Reclamation Project Water.** Surface or ground water, including project return flows, which is pumped, diverted, and/or stored:
- (1) Based upon the exercise of water rights which have been appropriated or acquired by the United States or others, or which have been decreed, permitted, certificated, licensed, or otherwise granted to the United States or others, for a Reclamation project or a Water Conservation Utilization Act of 1939 (Pub. L. 76-398; 53 Stat. 1418) (WCUA) project, or
 - (2) Based upon a withdrawal or reservation of water from appropriation by the United States for a Reclamation project or a WCUA project, or
 - (3) In accordance with section 215 of the Reclamation Reform Act of 1982 (43 U.S.C. 390oo), or
 - (4) Based upon an act of Congress which allocated or apportioned water to a Reclamation project or a WCUA project.
- E. **Transferred Work.** A transferred work is a Reclamation facility where O&M of that facility is carried out by a non-Federal entity⁶ under the provisions of a formal O&M transfer contract or other legal agreement with Reclamation.
- F. **Transferred Works Operating Entity.** A transferred works operating entity is an organization contractually responsible for performing the O&M of a transferred work.
4. **Responsibilities – Regional Directors.** Regional directors, or their delegates, are responsible for implementing this D&S and ensuring that employees under their direction comply with the requirements of this D&S, together with the regulations and statutes established for meeting Reclamation’s responsibilities to deliver water supplies for irrigation, municipal and industrial uses, and other purposes. All final determinations reached pursuant to this D&S are to be made by regional directors or their delegates, consistent with the direction provided herein and in 43 CFR part 429.
5. **Non-Agricultural Discharges to Reclamation Facilities.** Reclamation may authorize the use of its facilities to accept, from applicants, non-agricultural discharges, including those that may become commingled with irrigation return flows or other waters exempt from NPDES permitting requirements, when doing so is not detrimental to the best interests of the United States and any transferred works operating entities. However, Reclamation is under no obligation to provide such use authorizations. Reclamation will deny the authorization of any discharge that, in its judgment and sole discretion, would jeopardize existing exemptions from NPDES permit requirements associated with the receiving waters. Moreover, any Reclamation authorization of non-agricultural discharges into Reclamation

⁶For purposes of this D&S, “non-Federal entity” may include any entity authorized to assume operating and maintenance responsibilities for works that it shares jointly with Reclamation.

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facilities must comply with the following minimum requirements. Issuance of the NPDES permit or other authorization to discharge in compliance with the Clean Water Act is the responsibility of the corresponding state or Federal water quality permitting authority, not Reclamation. A non-agricultural discharge that meets the general requirements set forth below must also comply with applicable regional requirements prior to authorization by Reclamation.

- A. **Determination of D&S Applicability.** There are circumstances under which Reclamation will be able to adequately address the quality of water entering its facilities through procedures other than those established in this D&S. The Appendix A flow chart identifies circumstances under which the requirements of this D&S apply, in contrast to other circumstances and procedures applicable to addressing water quality in Reclamation facilities. Note that while this flow chart provides assistance in determining the applicability of this D&S, it will not identify every possible scenario. Determinations of applicability will be made by Reclamation's regional offices on a case-by-case basis, in consultation with the entity potentially interested in discharging to a Reclamation facility.
- B. **Concessions and Marinas.** All concessions and marinas that are located on Reclamation lands and/or waterbodies, and which generate non-agricultural discharges, including marina operations managed by Reclamation, managing partners, or contracted third parties, must comply with this D&S. Concessions must also comply with Reclamation Manual (RM) D&Ss, *Concessions Management by the Bureau of Reclamation*, LND 04-01, and *Concessions Management by Non-Federal Partners*, LND 04-02.
- C. **Use Authorizations.** Where the requirements of this D&S are determined to be applicable, any action by Reclamation to allow non-agricultural discharges into Reclamation facilities must comply with requirements for use authorizations, which are set forth at 43 CFR part 429 and RM D&S, *Land Use Authorizations*, LND 08-01. Additionally, the authorization shall include:
- (1) A provision allowing Reclamation to terminate the use, remove the discharge outfall, or authorize removal by a transferred works operating entity, and recover costs of removal from the discharging entity if the applicant fails at any time to meet the requirements of the NPDES permit, or if the non-agricultural discharge is altered in a manner that affects the conditions for NPDES permit compliance, or for other causes as described under 43 CFR 429.28;
 - (2) A provision specifying that Reclamation has the right to monitor flows, collect and conduct analysis of water samples, or require the discharger to periodically provide data for purposes of verifying that the authorized discharges comply with their use authorization. Reclamation, at its discretion, may transfer this right to the relevant transferred works operating entity;

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- (3) A provision specifying that Reclamation and, where applicable, the transferred works operating entity will have access upon request to any and all monitoring reports required by the NPDES permit;
- (4) A provision specifying the applicant's responsibility to provide Reclamation and, where applicable, the transferred works operating entity with written notification of any failure to comply with NPDES permit requirements, or of any changes in NPDES permit requirements applicable to their discharges to Reclamation facilities, at the time such notification is provided by the state or by the U.S. Environmental Protection Agency (EPA) to the discharger;
- (5) A provision specifying that the applicant does not hold any rights to the use, control, or release of the waters discharged to Reclamation facilities, except to the extent that such rights are recognized under applicable state law, and/or to the extent the applicant has entered into a contract with Reclamation specifying subsequent control and use; and
- (6) A provision clarifying the applicant's liability with respect to the potential effects of their discharges on entities downstream, which will be developed in consultation with appropriate staff from the Department of the Interior Regional Solicitor's Office.

D. **Transferred Works.** Where affected Reclamation facilities are operated by a transferred works operating entity that has accepted full liability for facility O&M, Reclamation shall consult with that entity and seek its written concurrence with the proposed use. Where the transferred works operating entity withholds written concurrence, and Reclamation determines that the objections raised by that entity are reasonable, Reclamation will deny the use authorization request. Incompatibility of the proposed discharge with relevant Reclamation contract provisions will provide a sufficient basis for rejecting the request.

E. **Assessments and Determinations.** Prior to consideration of any discharge request subject to this D&S, Reclamation will evaluate the physical capacity of the facility. Only when it is determined that capacity exists to safely carry this water shall a request for discharge be considered. Any additional operational, environmental, and safety-related assessments deemed necessary by the regional director, such as seasonality of flows, water quality considerations of receiving waters, impacts on downstream interests, impacts on the transferred works operating entity, and protection of Federal project purposes will be conducted at this stage before further consideration is given to the discharge request. These assessments will include an evaluation of additional O&M costs, if any, incurred by Reclamation or the transferred works operating entity in accepting the discharge, and these additional O&M costs shall be passed along to the applicant as a cost to be paid on an annual basis to the entity with O&M responsibilities. Costs associated with undertaking the assessments described in this article are the responsibility of the applicant.

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- F. **Renewals and Termination.** Reclamation use authorizations for the purposes described in this D&S will be granted for a term to be established by Reclamation, and where appropriate in consultation with the transferred works operating entity. At the end of that term, the discharger shall apply for a renewal of the use authorization following the same process specified in this D&S for a new discharge. Renewal of use authorizations for the purposes described in this D&S shall be contingent upon verification of compliance with past use authorizations, as determined by and at the discretion of the regional director, and subject to applicable policies, requirements, and laws. Changes in the quantity, quality, or timing of discharges that are inconsistent with information submitted to Reclamation in obtaining use authorization and that are detrimental to Reclamation or the transferred works operating entity will be considered grounds allowing for termination of the authorized use. Changes in water quality regulations to which Reclamation and/or the transferred works operating entity are subject also may establish the basis for a re-evaluation of the use authorization and rescission by Reclamation.
- G. **Compliance with NPDES Permitting.** Reclamation requires that the use authorization file for any non-agricultural discharge into a Reclamation facility include documentation that the discharger is in compliance with any applicable NPDES permit requirements; **or** documentation acceptable to the regional director that the discharge at issue does not require an NPDES permit from the discharger, including written confirmation from the applicable permitting authority (e.g., the state or EPA). Reclamation will require that the discharger provide a copy of any relevant NPDES permit or evidence of valid permit coverage for the use authorization file. To facilitate the review process, Reclamation will consider initiating its evaluation of the applicant's use authorization request concurrently with the applicant's efforts to obtain the necessary NPDES documentation.
- H. **Recordkeeping.** For each separate location where a non-agricultural discharge is authorized to enter a Reclamation facility, Reclamation will maintain, use, and dispose of these records in accordance with the RM D&S, *Information Management*, RCD 05-01.
- I. **Water Contracting.** Non-agricultural discharges to Reclamation facilities are subject to Reclamation policy including RM Policy, *Use of Excess Capacity in Reclamation Projects for the Impoundment, Storage, and Carriage of Non-Project Water*, WTR P04. Generally, water that is to be delivered to a specific entity will require a water contract. Each request for consideration of a non-agricultural discharge shall be reviewed by the regional director to determine whether a water contract is required. Where excess capacity or exchange contracts involve water subject to NPDES permitting, the evaluations in Paragraph 5.C. of this D&S will be addressed, and corresponding provisions appropriately incorporated into the contract.
- J. **Administrative and User Fees.** Appropriate fees will be charged pursuant to 43 CFR part 429; RM D&S, *Land Use Authorizations*, LND 08-01; and other applicable law

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and regulation. In accordance with those authorities, Reclamation will clarify with the applicant the fees to be charged for permitting, staff planning actions, recordkeeping, Reclamation water sampling costs (if any), value of the benefit provided, and other relevant costs.

6. **Unauthorized Discharges.** Procedures to address unauthorized discharges into Reclamation facilities are provided under 43 CFR parts 423 and 429. Reclamation will address unauthorized discharges in a manner and time frame deemed practicable by the region in consideration of legal and other obligations, priorities, and resources available, as the region becomes aware of the unauthorized discharges.

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